Petition

81-2172

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981 NO.81-

- X

Option Advisory Service, Inc., for itself and all other investment advisers and small corporations similarly situated,

Petitioner,

-against-

Board of Governors of the Federal Reserve Systems (in re: Midland Bank Limited),

Respondent,

and

Midland Bank Limited

Intervenor-Respondents.

- X

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May, 1982

QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution of the United States requires that a Court of Appeals should adjudicate on the merits, pursuant to Section 9 Bank Holding Company Act of 1956, as amended ("BHCA"), the petition of a party aggrieved by the Board's procedures in granting approval to a foreign principal (Midland) to acquire control of a bank holding company (Crocker);

2. Whether one invited by a notice published in the Federal Register "to give testimony, present evidence or otherwise participate in a public meeting" is a "party" within the meaning of Section 2(3) of the Administrative Procedure Act and has Article III

standing to have his objections heard and determined by the Board in accordance with Board's formal hearing rules;

3. Whether the term "aggrieved party" as used by Section 9 BHCA has a restrictive meaning that deprives a participant in Board proceedings of the right to seek judicial review as the remedy provided by Congress pursuant to First Amendment;

4. Whether a Court of Appeals has the power to dispense with the filing of the administrative record, as mandated by Section 9 BHCA, by the Record on Review Act, 28 U.S.C. Section 2112(b) and Rule 16, F.R.App. Proc. prior to entering summary judgment dismissing the statutory petition for review of a Board order;

5. Whether the Board's action in this

case was reasonable within the meaning of Section 202(a) of the Equal Access to Justice Act, 5 U.S.C. Section 504, 94 Stat. 2325;

6. Whether the Court of Appeals had jurisdiction to entertain the petition for review under the terms of the Misprision of Felonies At, 18 U.S.C. Section 4, where at least two felonies appear to have been committed by the applicants before the Board, namely, violations of the mail fraud statute, 18 U.S.C. Section 1341 and violations of the conflict of interest statute, 18 U.S.C. Section 208 (acts affecting a personal financial interest);

7. Whether the Court of Appeals did not abuse its discretion by assessing petitioner $250 costs under its Local

Rule 40 for having filed a petition for rehearing the purpose of which was to show that Midland had doubts about its status as an investment company within the meaning of the Investment Company Act of 1940;

8. Whether a person who answered a notice published in the Federal Register with respect to a Section 3(a)(1) BHCA application made by others did not suffer distinct and palpable injury to himself where the fees, costs and expenses incurred in participating in the proceeding and litigating against the Board's orders were not reimbursed to him pursuant to the Equal Access to Justice Act and where the Board's order sustained in modified form such person's protest without giving the person credit for it;

9. Whether the incomplete record upon which the Board has entered its order of August 25, 1981 (e.g. attorney conflicts of interest, foreign investment company vs. foreign bank holding company, purchase-and-sale of fiduciary office for $8,200,000, the Midland-EAB connection,) does not require remand to the Board for hearing and creation of a record to conform with the Record on Review Act, 28 U.S.C. Section 2112(b);

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Seigenfeld v. Thomas R. Wilcox et al. Civil Action No. 6343, opinion of December 28, 1981, Court of Chancery, State of Delaware

U.S.A. v. Bronston, 658 F. 2d 920 (2nd Circ,, 1981) petition for certiorari pending

JURISDICTION

The judgment sought to be reviewed was entered on December 28, 1981. A timely petition for rehearing was denied by the Court of Appeals on January 21, 1982. The jurisdiction of the Court of Appeals was invoked pursuant to Section 9 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1848, in the alternative pursuant to the Misprision of Felonies Act, 18 U.S.C. Section 4.

This petition for certiorari is filed within the time provided by Rule 20.4 as extended by the order of MR. JUSTICE MARSHALL, dated April 14, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT PURSUANT TO RULE 28.1

Petitioner Option Advisory Service, Inc. (OAS) is a New York corporation that was chartered in January, 1970. OAS has been registered as an investment adviser since February, 1970. OAS has no parent, subsidiary or affiliates.

THE PROCEEDINGS IN THE COURT OF APPEALS AND BEFORE THE BOARD

The summary judgment of the Court of Appeals dated December 28, 1981 has not been reported. Appellate jurisdiction was invoked pursuant to Section 9 of the Bank Holding Company Act of 1956, as amended, (BHCA), in the alternative pursuant to the Misprision of Felonies Act, 18 U.S.C.

Section 4. The judgment is in the appendix.

On January 21, 1982, the Court of Appeals has denied a timely petition for rehearing. On February 18, 1982, the Court of Appeals has granted Midland's motion for the taxation of costs against OAS relative to the petition for rehearing under its Local Rule 40. On March 29, 1982, the Court of Appeals has refused to reconsider its taxation-of-costs order. These three orders are in the appendix.

The Board's order of August 25, 1981 is in the appendix. The Board's (i) order of May 26, 1981 to hold a public meeting at San Francisco, California on June 22, 1981,(ii) letter decision of May 26, 1981 not to change the venue of the public meeting from San Francisco to New York,

(iii) September 21, 1981 letter decision not to reconsider its August 25 order (iv) letter decision dated October 20, 1981 not review its September 21 decision, are reproduced in the appendix.

The petition for review was filed in the Court of Appeals within thirty days from August 25, 1981.

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STATEMENT OF THE CASE

This is a petition for certiorari by OAS to review the summary judgment of the

Court of Appeals for the Second Circuit that was entered on December 28, 1981. The judgment dismissed a petition for review of an order entered on August 25, 1981 by the Board of Governors of the Federal Reserve System ("Board") approving an application under Section 3(a)(1) BHCA filed by Midland Bank Limited ("Midland") to acquire control of Crocker National Corporation ("Crocker"), a Delaware corporation that is the parent of Crocker National Bank of San Francisco, California. Crocker common stock is listed on the New York Stock Exchange. Midland is a foreign principal as that term is defined by Section 1(b)(2) of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. Section 611(b)(2), (FARA).

The controversy arose in the context

of a notice dated May 26, 1981 and published by the Board in the Federal Register of June 1, 1981 inviting public participation at a "public meeting" to be held on June 22, 1981 at the Federal Reserve Bank of San Francisco, California. The notice is in the appendix.

OAS timely moved to change the venue of the meeting from San Francisco to New York City. In accordance with the Board's order of May 26, 1981 (published June 1, 1981), OAS named its witnesses and identified them as executives of Midland's partners in EAB (infra). The Board denied the motion.

The matter is of intense interest to the 8,500,000 people in the New York Metropolitan area because Midland is a 20.125% partner in European American

Bancorporation, the parent of European American Bank ("EAB"), a $7.7 billion institution as of December 31, 1980. EAB is subject to the regulatory jurisdiction of the Federal Reserve Bank of New York. In 1974, EAB acquired from the Federal Deposit Insurance Corporation the deosits, $1.6 billion of selected assets, and a network of 100 branches of Franklin National Bank, Brooklyn, New York. Through this purchase, EAB became a major retail bank in the Metropolitan New York market, with most its operations on Long Island. As of December 31, 1976, EAB had $2.2 billion in domestic deposits and was the eleventh largest bank in the market, with 1.5% of the market's deposits.

The Board's May 26 notice did not mention the Midland-EAB connection, thus no one from the Metropolitan New York

area, other than OAS, appeared in opposition to Midland's application. The Board's order of August 25, 1981 did order Midland to divest its stock ownership in EAB, paying only superficial attention to the Midland-EAB relationship and the consequences to EAB of the divestiture order. Divestiture will impair the capital structure of EAB because Midland can sell its participation only under the stringent conditions imposed by the Board's order of May 10, 1977 permitting the formation of EAB. The Board did not review that order in light of the International Banking Act of 1978, 12 U.S.C. Section 3101 et seq. which became effective on September 17, 1978.

The Board's August 25, 1981 order did not update the facts with respect to

EAB as they were in 1981 ($7.7 billion in managed liabilities; ownership by foreign banks not subject to the Board's jurisdiction; heavy selling by the consortium banks of commercial paper to American money market funds as the counterpart of their capital contributions to EAB). Nor did the Board's order substantiate in any way its dictum that the Board had concluded in its 1977 decision that Midland and its EAB partners were not bank holding companies. Neither Midland nor its EAB partners were parties to the 1977 proceedings, hence their status under the BHCA could not have been adjudicated in their absence.

Since the proceedings before the Board involved the public interest, 12 C.F.R. 262.3(f), OAS appeared as a public

interest advocate and gave the Board ample notice, based on the facts then known to it, that it wished to enter upon the "complete record" required by Section 3(b) BHCA the following facts and issues:

1. that Midland's alleged source of funds for the acquisition of Crocker, was vague, indefinite and inflationary, suggesting financing by impermissible means, Riggs National Bank of Washington, D.C. v. Allbrittion, 516 F. Supp. 164 (1981);

2. that the Midland-Crocker transaction did not make sense since $825,000,000 borrowed at 14% would cost $115,500,000 in annual interest whereas the acquired Crocker shares would yield only $28,800,000 in dividends, leaving Midland with an annual deficit of about $86,700,000;

3. that the Depository

Institutions Management Interlocks Act ("the Interlocks Act"), 12 U.S.C. Sec. 3203, prohibits Mr. Malcolm G. Wilcox, a citizen of the United Kingdom, from becoming a director of Crocker for as long as Mr. Wilcox continues to be a director of EAB;

4. that Midland's proposed acquisition of Crocker would violate Section 3(d) BHCA, 12 U.S.C. Sec. 1842(d) since Midland, a 20.125% partner in EAB, would control Crocker;

5. that Midland's control, since 197[illegible] of Thomas Cook, Inc. ("TCI"), a New York corporation issuing and selling travelers checks was in violation of Section 3(a) BHCA because TCI is a "bank" within the meaning of Section 2(c) BHCA; travelers checks are defined as "deposits" by Section 1813(l)(1) of the Federal Deposit Insurance Act;

6. that in order to induce Crocker's incumbent management to recommend Midland's takeover of Crocker, Midland had agreed to pay to six incumbent Crocker directors the market value of their unexercised call options on Crocker stock amounting to some $8,200,000; this matter was then the subject of litigation in a Delaware State court, Seigenfeld v. Thomas R. Wilcox et al. supra; (see appendix)

7. that such payment by Midland to such directors constituted the purchase and sale of fiduciary duties, by the use of the mails and of the instrumentalities of interstate commerce, and raised related issues under Section 3(c) BHCA, Rosenfeld v. Black, 445 F. 2d 1337 (2nd Circ., 1971), cert. dismissed, 409 U.S. 802 (1971) ;

8. that Midland's partners in EAB

were and are sellers of unregistered commercial paper in the United States, which paper could be the source of Midland's funds for the acquisition;

9. that Midland would finance its purchases of Crocker stock with proceeds from sales in the United States of unregistered commercial paper, primarily to American money market funds;

10. that Midland's financing of the takeover could be in violation of the Board's Regulation U, 12 C.F.R. Part 221 (Credit by Banks for the Purpose of Purchasing or Carrying Margin Stocks) and Regulation X, 12 C.F.R. Part 224 (Rules governing Borrowers who obtain Securities Credit).

On August 25, 1981, the Board entered its order approving Midland's BHCA applications without addressing many

of these issues. However, the Board did require Midland (1) to reduce its interest in EAB to five percent or less within three years of consummation of the transaction and (2) to divest the travel agency operations of TCI or reduce Midland's interest in TCI to five percent or less within two years of consummation of the transaction.

The Board did not give OAS credit for raising issues relative to the Midland-EAB connection. This omission goes to the issue of OAS's claim for reimbursement of its costs, fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. Section 504 note, 94 Stat. 2325. Nor did the Board address, sua sponte, issues arising under Section 611 (c)(1)(iv) FARA which requires any person acting as agent for a

foreign principal and representing such principal before the Board to register under that Act.

The petition for judicial review was filed in the Court of Appeals within thirty days of the August 25, 1981 Board order. On August 31, 1981, the Board granted OAS the right to request reconsideration of its order. On Sepetember 21, 1981, reconsideration was denied by the Board's General Counsel, acting by delegation of authority from the Board, 12 C.F.R. 262.3(k).

OAS's petition for administrative review, 12 C.F.R. 265.3, was denied by the Board on October 20, 1981. This completed the process of exhausting administrative remedies.

On October 21, 1981, Midland filed

an application with the S.E.C. for total exemption from all provisions of the Act of 1940, 15 U.S.C. Section 80a-6(c). The alleged purpose of the exemption sought was to enable Midland to sell unregistered commercial paper in the United States. This confirmed OAS's suspicions, previously expressed to the Board, that Midland would seek to finance its $825,000,000 acquisition of Crocker stock with the proceeds from sales of unregistered commercial paper in the United States. OAS opposed Midland's application on a number of grounds. On February 16, 1982, the S.E.C. granted the application, noting OAS's opposition and holding that OAS was not an "interested person". The order is in the appendix.

Following the filing of the petition for judicial review, and the granting of

Midland's motion to intervene, OAS moved to disqualify the law firm of Shearman & Sterling from representing Midland on the grounds (1) that Midland had two directors on the board of EAB, Mr. Malcolm G. Wilcox and Edward Hallam Tuck, Esq., a law partner of Robert H. Knight, Esq., in Shearman & Sterling; as Federal Reserve Agent in New York, Mr. Knight is the Board's representative there; another Shearman & Sterling partner, Edward Bransilver, Esq. had represented Midland before the Board; and (2) that Shearman and Sterling had improperly represented Midland before the Board since, under New York partnership law, the fees received by the partnership from Midland are deemed to be equally distributed to all partners, meaning that Mr. Knight would receive his share of the fees paid by Midland to Shearman & Sterling. Relevant

portions of the partnerships certificate are in the appendix.

The Board and Midland moved to dismiss the petition for judicial review for lack of standing under Section 9 BHCA and "for permission to file the administrative record late". On December 28, 1981, the Court of Appeals entered its summary judgment denying the motion to disqualify Shearman & Sterling and granting the Board's and Midland's motions to dismiss for lack of standing. The Court of Appeals denied, as moot, the Board's motion "for permission to file the administrative record late.".

Since Midland's October 21, 1981 application to the S.E.C. was published in the Federal Register of December 18, 1981, OAS brought the matter to the attention of the Court of Appeals by

means of a petition for rehearing. Without requesting a response, the Court of Appeals denied the petition without opinion on January 21, 1982. On Midland's motion, the Court of Appeals assessed OAS $250 costs under its Local Rule 40 and on March 29, 1982, the court refused to reconsider its action.

This petition for certiorari is being submitted for filing within the time as extended by the order of Mr. JUSTICE MARSHALL, dated April 14, 1982.

A R G U M E N T

Point I. The Court of Appeals' decision should be vacated and the case remanded for a hearing on the merits

This Court has never ruled on the standing issue as it is said by the lower court to arise under Section 9 BHCA. Since the Federal Rules of Appellate Procedure do not state which procedure is to be followed by an appellate court where the respondent raises the petitioner's standing as an issue, the question is of first impression, see e.g. standing to sue under the Fair Housing Act, 42 U.S.C. Sec. 3610, Havens Realty Corp. V. Coleman, ---U.S.---, 102 S.Ct.1114,(1981) decided February 24, 1982.

The standing issue under Section 9 BHCA has been squarely presented in OAS's

separate petition for certiorari in No. 81-1788, which is pending, Option Advisory Service, Inc., etc. v. Board of Governors of the Federal Reserve System etc. (in re: CCAH, CCAI and FGB).

As a public interest advocate, OAS is aggrieved by the Board's refusal to hold a formal hearing as required by its regulation, 12 C.F.R. 263.1(b)(5) for the purpose of resolving disputed issues of fact and law, see issues (1) through (10) under the Statement of the Case. OAS is further aggrieved because, as a party to the proceeding, the Board's rulings on points of law have not been reviewed by the Court of Appeals. For example, the Board has accepted in modified form OAS'S contention that Midland should be ordered to divest its participation in EAB. The Board does not cite any statutory

authority in its order for the proposition that Midland should be permitted to complete divestiture within three years, unless extended. OAS has been invited to seek reconsideration of the Board's order but has no remedy in the Court of Appeals for review of the erroneous rulings made by the Board and its General Counsel.

The catch-all phrase in Section 9 BHCA ("the court shall have jurisdiction * * * to require the Board to take such action with regard to the matter under review as the court deems proper") gives a court of appeals wide discretion to "borrow" from the Judicial Review Act, 28 U.S.C. Section 2347(b).

Section 9 BHCA was enacted a few years after the Judicial Review Act became law. It provides a relatively

simple procedure for resolving procedural issues presented by a petition for review.

Point II. The Board's resistance to judicial review and to the principles of the Administrative Procedure Act is a matter of public record.

Although the Administrative Procedure Act has been the law for 36 years, the Board has little use or respect for it. For example, though the Board professes to be acting in the public interest, 12 C.F.R. 262.3(f), it is treating public interest advocates as its adversaries in judicial review proceedings, like the instant case. The Board presumes to satisfy the public interest standard through comments and proposed action prepared by its own staff, contrary to Section 5(d) of the Administrative Procedure Act (APA), 5

U.S.C. Section 554(d). In pertinent part, that Section states:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this title, except as witnesses or counsel in public proceedings. * * *

Notices of pending applications under Section 3 BHCA routinely appear in the Federal Register calling for public comment, e.g. J.P. Morgan, Inc., 46 Fed. Reg. 60503 (1981), Citibank (Delaware) 47 Fed. Reg. 12387 (1982). In the case at bar, the Board's original notice in the Federal Register, 46 Fed. Reg. 18066 (1981), drew only three protests, one of which requested the Board to hold a formal hearing on Midland's application. Thus, in a nation of 225,000,000 people, few persons seem interested in these

matters of public policy because of common knowledge that at the administrative level, the commenter will be considered to be the adversary of the Board's staff and that at the judicial level, he would be considered to be the adversary of the Board. In short, the Board converts a public interest proceeding into a private matter between the applicant and itself. Needless to say, private matters have no place in the Federal Register.

The Board's reluctance to hold public hearings is a matter of record, e.g. A.G. Becker, Inc. v. Board of Governors et al., 519 F. Supp. 602, 607 (D.C., D.C., 1981), appeal pending.[5/] Nor does the Board always publish in the Federal Register its statements of general policy. 1/ (see p.53). As an

example the Statement of Policy on Supervision and Regulation of Foreign Bank Holding Companies of February 23, 1979 which interprets the International Banking Act of 1978 (IBA), 12 U.S.C. Section 3101 et seq. has not been so published.2/, 3/ (see p.53).

Nor does the Board have any use for the Record on Review Act, 28 U.S.C. Section 2112(b) which is specifically incorporated into Section 9 BHCA, or Rule 16 F.R. App. Proc. No record as defined by the statute or the rule exists which is the reason why the Board had moved in the Court of Appeals "to delay the filing of the administrative record". Using the "standing to sue" pretext as a smokescreen, the Board makes a mockery of all of these statutes. The result is a wholesale violation of the applicable

Federal statutes, see (1) through (10) under the Statement of the Case.

Under all of these circumstances, the grant of certiorari is justified under Rule 17.1(a) of the Rules of this Court which states, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. (a) * * * ; (Where a Federal court of appeals) has so far departed from accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

This is certainly the case here.

Point III. The refusal of the Court of Appeals to review this case on the merits rises to Constitutional dimensions

The First Amendment to the

Constitution of the United States says:

> Congress shall make no Law abridging the Right of the People to petition the Government for the Redress of Grievances.

Congress has not written any such clause into the BHCA but the Second Circuit has made its own case law under Section 9. Drawing upon two of its decisions that have not been reviewed by this Court, Independent Investor Protective League v. S.E.C., 495 F. 2d 311 (2nd Circ., 1974) and Option Advisory Service, Inc. v. S.E.C., 668 F. 2d 120 (2nd Circ., 1981), the Second Circuit has formulated a case law on standing that, for practical purposes, eliminates the Section 9 remedy created by Congress.

The function of a court of appeals is to determine whether the lower court

or administrative agency has properly applied the standing test of Article III, Havens Realty Corporation v. Coleman, ---U.S.--- 102 S. Ct. 1114 (1982). A Federal court of appeals should review findings of fact made at the trial level under the "clearly erroneous" test of F.R.Civ.P. 52(a). Since the Board is an administrative agency, findings of fact that run to the standing issue should be made by an administrative law judge in the context of a formal hearing, 12 C.F.R. 263.1(b)(5). The Board should not be permitted to raise the standing issue as an afterthought in the Court of Appeals.

The case law developed by the Second Circuit injects an Article III issue into every petition for review under Section 9 BHCA, something that Congress did not

mean to do when it enacted that law. Article III limits Federal court jurisdiction to "controversies to which the United States shall be a party". The United States is a party to this controversy because the Board is an independent agency of the United States, a status neither contemplated nor provided for by the Constitution.

Obviously, a controversy created by a person invited by legal notice to comment on a Section 3(a)(1) BHCA application is justiciable under Article III. The proceeding involves the public interest which would otherwise not be represented by anyone else. The Second Circuit should have resolved the issues on the merits just as the Fourth Circuit did in Havens Realty.

Point IV. OAS has suffered distinct and palpable injury to itself as a result of commenting and litigating against the Board's order

A person who is invited by a legal notice in the Federal Register to comment on a Section 3(a)(1) BHCA application is also being invited to spend time, effort and money in submitting his comments and litigating against the Board. Precisely for this reason only three persons commented on Midland's BHCA application and of these only one requested a hearing.

Such a person is a "party" to the proceeding even though his participation may be limited. Section 2(2) APA, 5 U.S.C. 551(2) defines a person as

> an individual, partnership, coporation, association, or public or private organization other than an agency.

Section 2(3) APA, 5 U.S.C. 551(3) defines a "party" as

> a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

Thus when a person submits his comments and litigates the issues in the public interest, as here, he or she should have the right to expect reimbursement for his fees, costs and expenses as provided by the Equal Access to Justice Act, 5 U.S.C. Section 504(a)(1) and (b)(1), 94 Stat. 2325. Where, as here, the Board has unreasonably, arbitrarily and capriciously failed to adjudicate on the record the Section 3(a)(1) application and OAS's standing under Article III, OAS is left without remedy under Section 504.

The Equal Access to Justice Act has been enacted for the purposes stated by its Section 202(a), 5 U.S.C. 504 note. The Act is before this Court for the first time 4/ (see p.53) since it has become effective on October 1, 1981. The Act should have been construed by the Court of Appeals on the merits and not on a motion to dismiss without the administrative record being before it.

Point V. The Court of Appeals should have disqualified Shearman & Sterling, a law partnership, from representing Midland, regardless of OAS's standing to sue.

Promptly after Midland's motion to intervene had been granted by a single Judge of the Court of Appeals, OAS moved to disqualify Shearman & Sterling, Midland's attorneys on that motion, on the ground that the partnership could not

represent Midland since a partner. Robert H. Knight, Esq. is Federal Reserve Agent in New York. On that basis, Shearman & Sterling could properly represent only the Board in this proceeding.

On December 28, 1981, the Court of Appeals denied this motion on the ground that petitioner lacked standing to sue. For good measure, on the motion of Shearman & Sterling, the Court of Appeals assessed OAS $250 in costs for filing a petition for rehearing. The purpose of apetition for rehearing at the appellate level is to complete the record that may be submitted to this Court on a petition for certiorari. Rule 40 defeats that purpose.

The position of Federal Reserve Agent is governed by Section 4 of the Federal Reserve Act, 12 J.S.C. Section

305. By virtue of that statute, Mr. Knight receives a salary fixed by the Board and paid by the Reserve Bank. Also, by virtue of New York's partnership law, Mr. Knight is presumed to share in the fees received by Shearman and Sterling from Midland. The Court of Appeals should have resolved the matter under the terms of the conflict-of-interest statute, 18 U.S.C. Section 208. It refused to do so.

In addition, Edward Hallam Tuck, Esq., Mr. Knight's law partner, is a director of EAB. The Board's decision directs that

> Midland reduce its interest in EAB to five per cent or less of EAB's shares within three years of consummation of the transaction; * * *

Since Midland is being divorced from EAB, it should be represented by an attorney who is not a member of Shearman

& Sterling. Quite the contrary, Midland was represented before the Board by Edward Bransilver, Esq., Mr. Knight's and Mr. Tuck's law partner.

These conflicts of interest should have been disclosed on the record of the proceeding before the Board. Failure to do so could bring the partnership into conflict with the Mail Fraud statute, 18 U.S.C. Sec. 1841 which, according to the Second Circuit, requires disclosure by an attorney of any conflicts of interest whenever he uses the mails, United States v. Bronston, 658 F. 2d 920 (2nd Circ., 1981), petition for certiorari pending.

Also under the terms of Section 1(c)(1)(iv) FARA, 22 U.S.C. Section 611(c)(1)(iv), Shearman & Sterling are Midland's agents. Midland has no representative office, agency or branch

within the United States as contemplated by the 1978 International Banking Act. This could be the reason why Midland has appointed Shearman & Sterling as its agent before the Board and the S.E.C., the latter in connection with Midland's application for total exemption from the provisions of the Investment Company Act of 1940, 46 Fed. Reg. 61763. That application is in the appendix since it had been submitted to the Court of Appeals in connection with the petition for rehearing. The S.E.C.'s order of February 16, 1982 upon the application is included in the appendix as additional material pursuant to Rule 21.1(k)(iv).

If Shearman & Sterling claim a "lawyer's exemption" from all provisions of the FARA, Section 3(g), 22 U.S.C. Section 613(g), then the burden is on

that partnership to establish the facts that would support the exemption.

Point VI. Midland cannot be a foreign bank holding company and a foreign investment company at the same time.

Within two months of being declared by the Board to be a foreign bank holding company, Midland, through Shearman & Sterling, sought and obtained the S.E.C.'s exemptive order under Section 6(c) of the Investment Company Act of 1940, 15 U.S.C. Sec. 80a-6(c). This occurred because of Midland's doubts that it could be deemed to be an "investment company" for the purpose of the 1940 Act. Midland contended that if it were required to register as an investment company, it would be precluded from selling securities in the United States and, thus, denied access to "the only

dollar-denominated commercial paper market in existence", id. at 61765. (46 Fed. Reg.)

On or before August 25, 1981, the Board had no knowledge of Midland's "doubts" concerning its status under the 1940 Act. Had such "doubts" been disclosed in Midland's BHCA application, the Board would have been faced with the problem of approving a foreign investment company's application to convert to a foreign bank holding company. Thus, the basis for the Board's application is legally incorrect. So far as could be determined from reported cases, this is the first time that the Board has approved a Section 3(a)(1) BHCA application of a foreign investment company.

OAS has duly brought this matter to

the attention of the Court of Appeals. For doing so, OAS was assessed $250 costs under Local Rule 40, at the request of Midland.

Point VII. Midland's payment of $8,200,000 to Crocker directors and executives for options surrendered by them has not been tested under the standards of Section 3(c) BHCA

Five days before the Board entered its order of August 25, 1981, Midland entered into a Stipulation of Settlement in a Delaware court action that had sought to challenge Midland's payment to Crocker directors of $8,200,000 as and for options surrendered by them. Relevant parts of this stipulation are found in the appendix as other materials including the full text of the Delaware Court's opinion of December 28, 1981.

Under the Second Circuit's opinion in Rosenfeld v. Black, 445 F. 2d 1337 (2nd Circ., 1971), cert. dismissed, 409 U.S. 802, (1972) this constituted the purchase by Midland and the sale by Crocker directors and executives of fiduciary office. The matter was deemed worthy of certiorari in 1972. It is certainly worthy of certiorari review in 1982. Such a transaction goes the issue of "managerial resources" of an acquiring company (Midland) as well as the target bank's (Crocker) under Section 3(c) BHCA. The matter was specifically brought to the Board's attention by means of a petition fo. administrative review dated September 23, 1981. The Board has ignored it.

Point VIII The Board's order of August 25, 1981 has been entered upon an incomplete record.

The points made in this petition show beyond peradventure of doubt that the record upon which the Board has acted was incomplete for the purposes of Section 3(b) BHCA, 12 U.S.C. Section 1842(b). Despite the insufficiency of such a record, the Board has certified its order to the Attorney General pursuant to Section 11(b) BHCA, 12 U.S.C. Sec. 1849(b). Therefore, no weight should be given to the Attorney General's failure to challenge the Midland-EAB connection under the anti-trust laws.

Evidently, the purpose of a notice in the Federal Register is to attract attention to matters of public interest. Thus it is the public interest advocate's heavy responsibility to bring to the attention of the Board and the courts substantial and serious deficiencies in a

Section 3(b) record. The inhospitable attitude of the Second Circuit to OAS's efforts has chilled and deterred OAS from seeking judicial review of the S.E.C.'s February 16, 1982 order. The abuse suffered by OAS for having exercised its First Amendment rights is substantiated by the record of the proceedings in the Second Circuit. OAS has suffered Article III injury in fact and should be granted the relief which the Court may dispense in the exercise of the Court's power of supervision.

CONCLUSION

Since the Second Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departures by the Board,

its judgment of December 28, 1981 should be summarily vacated and the cause remanded for judgment on the merits on a record that complies in all respects with the Record on Review Act, 28 U.S.C. Sec. 2112(b).

Respectfully submitted:

Antonio C. Martinez
Attorney for Option
Advisory Service, Inc.
324 West 14th Street
New York, N.Y. 10014
(212) 989-0404

1/ The Board's Policy Statement concerning the Sale of Third Party Commercial Paper by State Member Banks has been published in the Federal Register, 46 Fed. Reg. 29333.

2/ The preamble to the 1978 IBA declares that the statute's purpose is "to provide for Federal regulation of participation by foreign banks in domestic financial markets". The Board's order of August 25, 1981 fails to explain why Midland's acquisition of Crocker, in October, 1981, is not in any way covered by any of the provisions of the IBA.

3/ Another current example of the Board's defiance of the procedures described by the APA is shown by the Board's failure to act in corpore in the matter of the $1.1 billion credit facility dated February 22, 1982 from a banking syndicate to Placid Oil Company for the purpose of carrying speculative positions in silver bullion. Without citing any specific statutory authority, such credit facility was "not objected to" by the Chairman of the Board, the Hon. Paul A. Volcker.

4/ Issues under the Act are also presented by the petition for certiorari in No. 81-1788, OAS v. Board of Governors etc., March 24, 1982.

5/ The Board did not challenge the plaintiff's standing to sue in A.G. Becker and the District Court did not consider the issue.

Appendix

81-2172

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981 NO.81-

- X

Option Advisory Service, Inc., for itself and all other investment advisers and small corporations similarly situated,

Petitioner,

-against-

Board of Governors of the Federal Reserve Systems (in re: Midland Bank Limited),

Respondent,

and

Midland Bank Limited

Intervenor-Respondents.

- X

APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Antonio C. Martinez, Esq.
Attorney for Petitioner
324 West 14th Street
New York, N. Y. 10014
(212) 989-0404

May, 1982

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2. Order filed February 18, 1982 granting Midland's motion for assessment of costs upon petitioner under Local Rule 40 3a

3. Order filed January 21, 1982 denying petition for rehearing. 4a

4. Summary judgment filed December 28, 1981 dismissing petition for review. 6a

5. Notice of filing of Application of Midland Bank Limited dated December 11, 1981, for an S.E.C. order pursuant to Section 6(c) Investment Company Act of 1940. 11a

6. Board's Letter decision dated October 20, 1981 denying petition for administrative review. 21a

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8. Board's Letter decision dated August 31, 1981 granting petitioner right to seek reconsideration of Board order. 25a

9. Board order of August 25, 1981 granting Midland's petitions for the acquisition of control of Crocker. 27a

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10. Letter decision dated June 22, 1981 denying petitioner's motion for a change of venue of the public meeting of June 22, 1981 from San Francisco to New York. 60a

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14. Amended Certificate of partnership of Shearman & Sterling. 69a

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(not in the record before the Court of Appeals)

15. Stipulation and Agreement of Settlement Florence Seigenfeld v Thomas R. Wilcox, et al., C.A. 6343, Court of Chancery, State of Delaware, in and for New Castle County. 75a

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United States Court of Appeals

Second Circuit

81-4174

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of March, one thousand nine hundred and eighty-two

Present:

HON. WILFRED FEINBERG, CH.J.
HON. J. EDWARD LUMBARD, Circuit Judge
HON. JOHN R. BARTELS, District Judge

OPTION ADVISORY SERVICE, INC., for itself and all other investment adivsers and small corporations similarly situated,

Petitioner,

-against-

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (in re: Midland Bank Limited) Washington, D.C. 20551,

Respondent,

-and-

MIDLAND BANK LIMITED,

Intervenor-Respondent.

A statement of costs having been entered pursuant to the order of the court granting a motion, which the petitioner had opposed, for recovery under rule 40 of the court's rules supplementing the Federal Rules of Appellate Procedure, and counsel for petitioner having thereafter submitted an opposition to the statement of costs, and said opposition having been construed as a motion to reconsider the statement of costs,

ON CONSIDERATION WHEREOF, it is

ORDERED that reconsideration of the statement of costs be, and the same hereby is, DENIED.

Filed
March 29, 1982

A. Daniel Fusaro, Clerk

by Francis X. Gindhart
Chief Deputy Clerk

Docket Number 81-4174

NOTICE OF MOTION
for Recovery Pursuant
to Second Circuit Rule 40

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPTION ADVISORY SERVICE INC.,

Petitioner,

-against-

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM AND MIDLAND BANK LIMITED,

Respondent

Brief statement of this relief requested:

Taxation against Petitioner of $250 by reason of the filing of a Petition for Rehearing that was wholly without merit and vexatious. See Second Circuit Rule 40. * * *

IT IS HEREBY ORDERED that the motion

be and it is hereby granted

WILFRED FEINBERG, Chief Judge

J. EDWARD LUMBARD, Circuit Judge

JOHN R. BARTELS, District Judge

Filed
FEB. 18, 1982

United States of Appeals

SECOND CIRCUIT

No. 81-4174

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of January , one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE J. EDWARD LUMBARD
Circuit Judge

HONORABLE JOHN R. BARTELS
District Judge

OPTION ADVISORY SERVICE, INC., for itself and all other investment advisers and small corporations similarly situated,

Petitioner

-against-

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (in re: Midland Bank Limited) Washington, D.C. 20551,

Respondent,

-and-

MIDLAND BANK LIMITED,

Intervenor-Respondent

----------x

A petition for a rehearing having been filed herein by counsel for the petitioner, Option Advisory Service, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk
By Francis X. Gindart
Chief Deputy Clerk

Filed: January 21, 1982

United States Court of Appeals

for the

SECOND CIRCUIT

No. 81-4174

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and eighty-one.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Present:
HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE J. EDWARD LUMBARD
Circuit Judge

HONORABLE JOHN R. BARTELS */
District Judge

OPTION ADVISORY SERVICE, INC., for itself and all other investment advisers and small corporations similarly situated,

Petitioner,

-against-

BOARD OF GOVERNORS OF THE FEDERAL RESERVE

SYSTEM (in re: Midland Bank Limited)
Washington, D.C. 20551,

Respondent,

-and-

MIDLAND BANK LIMITED,

Intervenor-Respondent.

----------x

These motions come to us as a result of the efforts of Option Advisory Service, Inc. (OA) to obtain review of an order of the Board of Governors of the Federal Reserve System (the Board) approving Midland Bank Limited's (Midland's) acquisition of 51% of the voting shares of Crocker National Corporation.

The Board and Midland move to dismiss the petition for review for lack of jurisdiction. We grant this motion. The Bank Holding Company Act (the Act) provides for judicial review at the

request of "(a)ny party aggrieved by an order of the Board," 12 U.S.C. 1848. OA is not an aggrieved party within the meaning of the Act. As we have pointed out before, the term "aggrieved party" has a restrictive meaning. Petitioner must either allege a direct injury or demonstrate that it is within the zone of interest protected by the Act, e.g., Independent Investor Protective League v. SEC, 495 F.2d 311 (2d cir. 1974); Option Advisory Service, Inc. v. SEC, 668 F.2nd 120. Furthermore, the Equal Access to Justice Act, 5 U.S.C. 504, and the Misprision of Felonies Act, 18 U.S.C. 4, do not confer standing, see Option Advisory v. SEC, supra.

The Board also moves for permission to file a memorandum of law in support of its motion to dismiss in excess of ten

pages and for permission to file the administrative record late. We grant the former motion and deny the latter as moot.

Finally, OA moves to disqualify Shearman & Sterling as attorney for Midland and to review Judge Newman's order granting Midland leave to intervene. We deny the motion on the ground, already explained above, that OA lacks standing.

WILFRED FEINBERG, Chief Judge

J. EDWARD LUMBARD, Circuit Judge

JOHN R. BARTELS, District Judge

Filed

December 28, 1981

---

*/ Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by desingation.

Federal Register / Vol. 46, No. 243 /
Friday, December 18, 1981 / Notices
Page 61763

(Release No. 12101; 812-4997)

Midland Bank Ltd.; Filing of Application

December 11, 1981.

Notice is hereby given that Midland Bank, Limited ("Applicant"), c/o Peter Darrow, Esq., Shearman & Sterling, 53 Wall Street, New York, New York 10005, filed an application on October 21, 1981, for an order of the Commission, pursuant to Section 6(c) of the Investment Company Act of 1940 ("Act"), exempting Applicant from all provisions of the Act. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

Applicant states that it provides directly, or through its subsidiaries, a wide range of banking and financial services to individuals and corporations. Applicant further states that it was first established as a banking corporation in 1836 by a deed of settlement under the name "The Birmingham and Midland Bank", and changed its name in 1923. Applicant's principal office is at Poultry, London, EC2P 2BX, England. Applicant states that its domestic banking in England, Wales, Scotland, Northern Ireland and in the Republic of

Ireland is conducted through a network of approximately 3,000 branches of Applicant itself or by subsidiaries. In addition to traditional commercial banking services, Applicant states it is also engaged in merchant banking, equity finance, property finance, consumer finance, credit card operations, equipment leasing, factoring and the world-wide provision of travel services and the sale of travelers checks through The Thomas Cook Group Limited.

Applicant states that as of December 31, 1980, the Midland Bank Group had total assets of approximately $60.4 billion, of which approximately $47 billion consisted of loans and overdrafts and placings with banks. As of December 31, 1980, total liabilities were approximately $57.2 billion, of which $54.6 billion consisted of deposits. According to the application, Applicant had outstanding as of December 31, 1980, 164,307,933 shares of common stock representing an aggregate market value of approximately $1.3 billion. Applicant states that as of December 31, 1980, it was the third largest banking organization in the United Kingdom and the seventeenth largest bank in the world in terms of total assets.

Applicant represents that is is subject to a variety of regulatory measures in the United Kingdom. According to the application, the Bank of England has broad power under the Bank of England Act 1946 to request information from and to make recommendations to United Kingdom banks. In addition, Applicant states it is subject to the Banking Act 1979 which

supplements the Bank of England's general supervisory powers. Applicant states the Bank Act 1979 regulates the use of banking names and descriptions, incorporates provisions controlling advertisements for deposits, and provides for the establishment of a Deposit Protection Board. Applicant further states that regulation of the United Kingdom banking system is largely based upon informal cooperation between the Bank of England and United Kingdom banks and operates through a number of accepted practices including the filing of periodic reports and periodic statistical returns prescribed by the Bank of England. In addition, the Banking Act 1979 requires the Bank of England to introduce formalized codes relating to the adequacy of capital, liquidity and foreign currency exposure. According to the application, the Bank of England also advises H.M. Treasury in the formulation of the United Kingdom government's monetary policy. Applicant states that on August 20, 1981, the Bank of England introduced new methods of monetary control whereby United Kingdom banks must maintain at least a certain proportion of their eligible liabilities in certain defined assets.

Applicant states that on October 15, 1981, it completed the acquisition of approximately a 51% equity interest in Crocker National Corporation, a bank holding company organized under the laws of Delaware whose principal executive offices are located in San Francisco, California. According to the application, Applicant will be required to register as a foreign bank holding company as a

result of this acquisition under the Bank Holding Company Act of 1956. Applicant states that under the Bank Holding Company Act of 1956, the Federal Reserve Board regulates the types of activities in which a foreign bank holding company may engage in the United States and requires the filing of annual reports regarding its overall operations. Applicants further states that it has arranged to register as a foreign bank holding company within four months after the end of its current fiscal year.

Applicant proposes to offer, issue and sell short-term commercial paper maturing in not more than nine months after the date of issue ("Notes"). The Notes will be in bearer form, denominated in United States dollars and issued in minimum denomination of $100,000. They will rank pari passu among themselves and equally with all other unsecured indebtedness of Applicant, including deposits and superior to the rights of shareholders of Applicant. According to the application, the Notes will not be payable on demand nor include any provision for extension, renewal on automatic "rollover" at the option of either the holders thereof or the Applicant.

Applicant states that the Notes will qualify for the exemption from registration under the Securities Act of 1933 ("1933 Act") provided by section 3(a)(3) of the 1933 Act. Applicant will not offer the Notes until it has received an opinion of its legal counsel in the United States to the effect that the proposed offering is entitled to the

exemption provided by section 3(a)(3) of the 1933 Act. Applicant does not request review or approval of such opinion letter and the Commission expresses no opinion as to the availability of any such exemption. Applicant represents that the presently proposed issue of Notes, and any future issue of debt securities in the United States will have received, prior to issuance, one of the three highest investment grades from at least one nationally recognized statistical rating organization and that its United States counsel will have certified that such rating has been recieved.

Applicant states that the Notes will be sold through a United States securities dealer to institutional investors and other entities and individuals who normally purchase commercial paper, and will not be advertised or otherwise offered to the general public. Applicant agrees to secure an undertaking from the dealer in the Notes that it will provide each offeree of the Notes, prior to any sale of Notes to such offeree, with a memorandum that describes the business of Applicant and that contains the most recent publicly available annual financial statements of Applicant which will include a balance sheet, profit and loss account and statement of source and application of funds and which have been audited in such a manner as is customarily done for Applicant by its auditors. In addition, such memorandum will contain Applicant's most recent publicly available unaudited interim financial statement and will be updated periodically to reflect material changes

in Applicant's business and financial condition. The memorandum will be at least as comprehensive as those customarily used in offering commercial paper in the United States. Such memorandum will describe the material differences between the accounting principles applied by Applicant and generally accepted accounting principles applicable to United States Commercial banks. Applicant consents to any order granting the relief requested pursuant to section 6(c) of the Act being expressly conditioned upon Applicant's compliance with all undertakings regarding disclosure documents.

The Application states that Applicant will appoint a bank in the United States as its authorized agent to issue the Notes from time to time and will appoint an agent to accept any service of process in any action based on the Notes an instituted in any state or federal court in by the holder of any Note. Applicant consents to the jurisdiction of any state or federal court in the Borough of Manhattan in the City and State of New York in respect of any such action. Such appointment of an authorized agent to accept service of process and consent to jurisdiction will be irrevocable until all amounts due and to become due with respect to the Notes have been paid by Applicant. Applicant will also be subject to suit in any other court in the United States which would have jurisdiction because of the manner of the offering of the Notes or otherwise. Applicant states that the authorized agent will not be a trustee for the holders of the Notes or otherwise

obliged to act for them. Applicant similarly represents that it will consent to jurisdiction and will appoint an agent for service of process in suits arising from any future offer of debt securities that it may make in the United States.

Applicant states that it may offer other securities for sale in the United States, including long-term debt securities. Applicant represents that any future offering of its securities in the United States will be made pursuant to a 1933 Act registration statement or an applicable exemption from registration under the 1933 Act. In connection with any such offering. Applicant undertakes to insure that any offeree will be provided with disclosure documents at least as comprehensive in their description of Applicant and its business and financial condition as the dealer's memorandum referred to above. In no event will such disclosure be less comprehensive than is customary for United States offerings of similar debt securities.

Section 3(a)(3) of the Act defines investment company to mean "any issuer which is engaged or proposes to engaged in the business of investing, reinvesting, owning, holding, or trading in securites, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash item) on an unconsolidated basis."

Section 6(c) of the Act provides, in part, that the Commission, by order upon

application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, or any rule or regulations under the Act, if and to extent that such exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant states it is applying to the Commission because of uncertainty whether or not it would be defined as "investment company" under the Act.

Applicant contends that approval of its application is both necessary and appropriate in the public interest. According to Applicant, if it were required to register as an investment company, it would be precluded from selling securities in the United States and, thus denied access to the only dollar-demoninated commercial paper market in existence. Applicant asserts the public interest would be served by permitting institutional and other sophisticated investors the opportunity to acquire commercial paper issued by it. Applicant further asserts that the requested exemption would be consistent with the protection of investors. Applicant notes that it is subject to regulation by United Kingdom banking authorities and is subject to regulation as a foreign bank holding company under the Bank Holding Company Act of 1956. In addition, applicant states any offering of its securities in the United States would be subject to the antifraud provisions of the federal securities

laws. Finally, Applicant contends that it is different from the type of institution that Congress intended the Act to regulate. Applicant asserts that granting an exemptive order pursuant to section 6(c) of the Act would be appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Notice is further given that any interested person may, not later than January 5, 1982, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the application accompanied by a statement as to the nature of his interest, the reasons for such request, and the issues, if any, of fact or law proposed to be controverted, or he may request that he be notified if the Commission shall order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicant at the address stated above. Proof of such service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the application herein will be issued as of course following said date unless the Commission thereafter orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in

this matter, including the date of the hearing (if ordered) and any postponements thereof.

For the Commissions, by the Division of Investment Management, pursuant to delegated authority.

George A. Fitzsimmons,
Secretary

(FR Doc. 81-36142 filed 12-17-81; 8:45 am)
Billing Code 8010-02-M

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

October 20, 1981

Mr. William Leighton
President
Option Advisory Service, Inc.
P.O. Box 34
Village Station
New York, New York 10014

Dear Mr. Leighton:

I am writing in reference to your petitions of September 23, 1981, pursuant to section 265.3 of the Board's Rules Regarding Delegation of Authority (12 C.F.F. 265.3), requesting that the Board review the September 21, 1981 actions of the General Counsel of the Board. The General Counsel had determined that your September 5, 1981 request for reconsideration of the Board's action of August 25, 1981, approving the application of Midland Bank Limited, London, England, to become a bank holding company by acquiring Crocker National Corporation, San Francisco, California, and your September 11, 1981 request for reconsideration of the Board's action approving the applications by Credit and Commerce American Holdings, N.V., Willemstad, Netherlands Antilles, Credit and Commerce American Investment, B.V., Amsterdam, The Netherlands, and FGB Holding Corporation, Washington, D.C.,

presented no new facts that were not before the Board when it considered the applications and, accordingly, should be denied.

In accordance with section 265.3 of the Board's Rules Regarding Delegation of Authority, your petitions have been provided to the Board and your comments have been considered. The Board believes that for the reasons specified in the Secretary of the Board's letters of September 21, 1981, your requests for reconsideration should be denied. Accordingly, the Board determined on October 20, 1981, not to review the General Counsel's actions in these matters.

Very truly yours

Williams W. Wiles
Secretary of the Board

cc: Federal Reserve Bank of Richmond
Federal Reserve Bank of San Francisco
Mr. Edward Bransilver
Mr. Robert Altman

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

September 21, 1981

Mr. William Leighton
President
Option Advisory Service, Inc.
P.O. Box 34
Village Station
New York, New York 10014

Dear Mr. Leighton:

I am writing in response to your letter of September 11, 1981, requesting the Board to reconsider its action of August 25, 1981, relating to the approval of the applications by Midland Bank Limited, London, England, to become a bank holding company by acquiring Crocker National Corporation, San Francisco, California.

Section 262.3(k) of the Board's Rules of Procedure provides that the General Counsel of the Board shall determine whether to grant a request for reconsideration. It is the General Counsel's judgment that your request presents no relevant facts that, for good cause shown, were not previously presented to the Board. Accordingly, pursuant to the authority delegated by the Board to the General Counsel in section 265.2(b)(7) of the Board's Rules Regarding Delegation of Authority, and

after consultation with Directors of other interested Divisions of the Board or their designees, your request for reconsideration is hereby denied.

Very truly yours,

William W. Wiles
Secretary of the Board

cc: Federal Reserve Bank of San Francisco
Mr. Edward Bransilver

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

August 31, 1981

Mr. William Leighton
President
Option Advisory Service, Inc.
P.O. Box 34
Village Station
New York, New York 10014

Dear Mr. Leighton:

The Board of Governors of the Federal Reserve System has approved the applications filed pursuant to sections 3(a)(1) and 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1) and 1843(c)(8)) and Section 25(a) of the Federal Reserve Act (12 U.S.C. 611 et seq.) by Midland Bank Limited, London, England ("Midland"), to acquire Crocker National Corporation, San Francisco, California, and its subsidiaries. The Board also denied an application by Midland filed pursuant to section 4(c)(9) of the Bank Holding Company Act (12 U.S.C. 1843(c)(9)) to retain the travel agency activites of Thomas Cook Inc., New York, New York. Enclosed is a copy of the Board's Order relating to these matters.

You may request the Board to reconsider its actions in this matter in accordance with sectin 262.3(k) of the Board's Rules of Procedure (12 C.F.R.

262.3(k)), a copy of which is enclosed for your information. Please note that the Rules provide that any such request must be in writing and must be received by the Secretary of the Board on or before the fifteenth day after the date of this letter.

Very truly yours,

William W. Wiles
Secretary of the Board

Enclosures: 1. Press Release
2. Order
3. Rules of Procedure

cc: Midland Bank Limited
Federal Reserve Bank of San Francisco

FEDERAL RESERVE SYSTEM

MIDLAND BANK LIMITED

Order Approving Formation of Bank Holding Company; Acquisition of Nonbank and Edge Act Subsidiaries and Retention of Nonbank Companies; Order Denying Retention of Travel Agency Activities of Thomas Cook, Inc.

Midland Bank Limited ("Midland"), London, England, has applied under section 3(a)(1) of the Bank Holding Company Act ("BHCA") (12 U.S.C. 1842(a)(1) for approval of the formation of a bank holding company by acquiring 51 per cent of the voting shares of Crocker National Corporation ("Crocker"), San Francisco, California.

Midland has also applied to do business under section 25(a) of the Federal Reserve Act (the "Edge Act") (12 U.S.C. 611-631) by acquiring indirectly the shares of three Edge Corporation

subsidiaries owned by Crocker National Bank: Crocker Bank International (Chicago), Chicago, Illinois; Crocker Bank International (New York), New York, New York; and Crocker International Investment Corporation, San Francisco, California. The factors that are considered in acting on these applications include those set forth in section 211.4(a) of the Board's Regulation K (12 C.F.R. 211.4(a)).

Midland has also applied, pursuant to section 4(c)(8) of the BHCA (12 U.S.C. 1843(c)(8)) and section 225.4(b) (2) of the Board's Regulation Y (12 C.F.R. 225.4(b) (2)), for permission to acquire indirectly voting shares of the following subsidiaries of Crocker: (1) Bishop Building Co., Inc., Honolulu, Hawaii, which owns and operates the Bishop Trust

Building in Honolulu and leases it to subsidiaries of Crocker and other tenants; (2) Bishop Trust Company, Ltd., Honolulu, Hawaii, which conducts a full-service trust business and provides limited data processing services to other Crocker subsidiaries; (3) Hawaii Finance Company Ltd., Honolulu, Hawaii, which operates as an industrial loan company making secured and unsecured loans to individuals; (4) Miles Crossing Ltd., Honolulu, Hawaii, which owns real estate mortgages and other real estate receivables; (5) CNC Insurance Agency Inc., San Francisco, California, which engages in the activity of acting as agent for credit life and credit accident and health insurance directly related to extensions of credit by Crocker's subsidiaries; (6) Crocker Investment Management Corp., San Francisco,

California, which engages in the activity of providing portfolio investment advice and general economic and financial information and advice; (7) Crocker Mortgage Investment Company Inc., Los Angeles, California, which engages in the activities of originating, purchasing and servicing loans secured by real estate and servicing loans and other extensions of credit; (8) Western Bradford Trust Company, San Francisco, California, a trust company which furnishes services to security holders, brokers, dealers and issuers, provides data processing services to Crocker and its subsidiaries, and provides computer software services to Crocker and its subsidiaries; and (9) Crocker Holdings Inc., Germantown, Tennessee, which holds real estate related assets of Crocker that are in the process of liquidation.

In addition, Midland has applied, pursuant to section 4(c)(8) of the BHCA and section 225.4(b)(2) of the Board's Regulation Y, for permission to retain the following indirect subsidiaries: (1) Samuel Montagu (Metals), Inc., New York, New York, which engages in the activity of dealing in precious metals by buying and selling gold and silver on the spot and futures market for its own account, and deals with other precious metals dealers; (2) Thomas Cook, Inc., New York, New York, a company that engages in the issuance and sale of travelers checks; and (3) London American Finance Corporation, New York, New York, a commercial finance company specializing in overseas trade financing of products manufactured in the United States; (4) LAFCO (Western Hemisphere), Ltd., New

York, New York, which markets in the western hemisphere the services of certain financing affiliates and extends credit to Latin American importers of United States products; and (5) Export Credit Corporation, a commercial finance company specializing in overseas trade financing of products manufactured in the U.S.

The activities applied for have either been specified by the Board in section 225.4(a) of Regulation Y as permissible for bank holding companies, subject to Board approval of individual proposals in accordance with the procedures of section 225.4(b), or have been authorized by Order under section 4(c)(8) in particular cases.

Midland has also applied, pursuant to section 4(c)(9) of the BHCA (12 U.S.C.

1843(c)(9)) and section 211.23(f)(5) of the Board's Regulation K (12 C.F.R. 211.23(f)(5)), to retain Midland's interst in The Thomas Cook Group Ltd. ("TCG"), Peterborough, England. TCG provides retail and wholesale travel arrangements and issues and sells travelers checks on a worldwide basis through its subsidiaries.1/ (see p. 58a)

Notice of receipt of these applications has been given in accordance with sections 3 and 4 of BHCA (46 Fed. Reg. 18,066, (1981)), and the time for filing views and comments has expired. The Board has considered the applications and all comments received in light of the factors set forth in section 3(c) of the BHCA (12 U.S.C. 1842(c)), the considerations specified in sections 4(c)(8) and (9) of the BHCA, and the

purposes of the Edge Act.

Midland is the third largest of the major London clearing banks and the lead bank of the 15th largest banking organization in the world, with total deposits of approximately $55.1 billion.2/ Midland's business consists of the provision of a wide range of banking, financial and related services through its various subsidiaries and affiliated companies. Domestic banking is conducted through a network of more than 3,000 branches by Midland itself in England and Wales, and by subsidiaries in Scotland, Northern Ireland, and the Republic of Ireland. In addition to commercial banking and trust services, Midland engages in merchant banking, equity financing, mortgage banking, consumer financing, equipment leasing, factoring,

and providing travel services and issuing and selling travelers checks on a worldwide basis. Approximately 60 per cent of Midland's profits derive from domestic banking; 25 per cent from its international activities; and 15 per cent from related services.

Crocker does not engage directly in any activity except holding shares of its subsidiaries. Its banking subsidiary, Crocker National Bank ("Bank"), San Francisco, California, holds domestic deposits of approximately $11.4 billion, is the fourth largest banking organization in California, with 385 branches, and the 12th largest banking organization in the United States.3/ (see p. 58a). Upon consummation of this proposal, Midland would be the 10th largest banking organization in the

world.

Midland does not operate any banking offices in the United States.4/ Accordingly, the Board finds that approval of the proposal would have no significant effect on the concentration of banking resources or existing competition in any relevant area. Furthermore, while Midland has demonstrated that it is a likely entrant into the United States banking market, and has the financial resources to establish de novo offices in Bank's major market areas, most of the metropolitan California markets in which Bank competes are competitive markets; therefore, the elimination of probable future competition would not be significant. Accordingly, the Board finds consummation of the proposal would have no significant

effect on probable future competition.

The financial and mangerial resources and future prospects of Midland appear generally satisfactory. Under the proposed transaction, Crocker would receive capital injections totalling $495 million. In the first stage of the proposal, Midland would acquire 51 per cent of Crocker for $595 million, of which $270 million would be added to Crocker's capital funds through the purchase of newly issued shares. In the second stage of the proposal, Midland, at its option or upon call by Crocker, would purchase over four years new common shares from Crocker for a total of $225 million. The additional purchase would increase Midland's ownership of Crocker from 51 per cent to 57 per cent.

The Board regards the additional

capital being provided to Crocker as a result of the transaction as a positive factor in that it provides the opportunity to achieve a permanent enhancement of Crocker's capital position, Moreover, the Board expects that both Midland and Crocker will be mindful of this opportunity in the employment of the new capital funds.

The Board notes that Crocker's capital ratios are comparable to the ratios of other large U.S. banks at the present time. The Board, however, is aware that the capital ratios of the largest U.S. banks have generally declined over the past few years while, at the same time, the risks to which they are exposed have increased. The Board believes, therefore, that banks in this positions should avail themselves of

every opportunity to strengthen their capital positions. The injection of capital by Midland provides such an opportunity consistent with a reasonable rate of growth in Crocker's assets. In exercising its responsibility under the Bank Holding Company Act, the Board will monitor closely the capital position of large banking organizations in connection with their future expansion plans.

In light of all the facts of record, the Board concludes that banking factors and considerations relating to the convenience and needs of the communities to be served are consistent with approval of the applications. It is the Board's judgment that, with respect to the application filed under section of 3 of the BHCA, consummation of the proposal would be in the public interest and

should be approved.

In reaching these conclusions, the Board has given due consideration to the public comments received on these applications, and the views expressed at the public meeting ordered by the Board on the proposal and held in San Francisco, California, June 22, 1981. The Board had ordered this meeting because of the importance of Crocker in the communities in which it operates and the interest of the public in the proposal. The objections expressed in the written submissions and at the public meeting were based primarily upon issues related to the foreign acquisition of U.S. banks in general and Community Reinvestment Act ("CRA") considerations. The Board has determined that these objections do not warrant denial of the application. The

Board notes that there is no statutory authority in the BHCA for taking into account the nationality of the acquiring company, and that CRA does not apply to a transaction where the acquiring banking organization has no banking presence in the U.S. The Board also considered the written submissions and oral presentations at the June 22 meeting in regard to their bearing on the convenience and needs factors that the Board must consider under the BHCA and found that these factors are positive and consistent with approval as discussed above. Accordingly, the Board has determined that the public comments on the applications do not raise issues that would warrant denial, or conditioning the approval of this applications.

As discussed above, Midland

currently has a 20.125 per cent ownership interst in European-American Bancorp ("EAB"), New York, New York, a bank holding company with respect to European-American Bank and Trust Company ("EABTC"), New York, New York. At the time the Board approved EAB's application to become a bank holding company in 1977 (63 Federal Reserve Bulletin 595), the Board concluded that neither Midland nor any of the other five foreign banks having interests in EAB should be considered bank holding companies, individually or collectively.5/ (see p. 58a)

Section 3(d) of the BHCA (12U.S.C. 1842(d)) generally prohibits the Board from approving an application that would permit a bank holding company to acquire more than 5 per cent of the voting shares

of a bank located outside of the bank holding company's principal State of banking operations, unless such acquisition is specifically authorized by State law. Although Midland is not currently a bank holding company, the effect of Midland's acquisition of Crocker while maintaining its present interest in EAB would be inconsistent with the legislative direction contained in section 3(d).

Therefore, in order to prevent any evasion of the provisions and purposes of section 3(d), the Board has determined that Midland should be required to divest its interest in EAB. In light of the unique structure of EAB as a consortium organization, and taking into consideration EABC's acquisition in 1974 of the assets of Franklin National Bank,

the Board believes that it would be appropriate to allow Midland a longer period of time than is usual in order to complete the divestiture. The additional time will provide EAB and its owners flexibility to assure that the capital strength of the institution will be adequately maintained. Therefore, the Board has determined that Midland should reduce its interest in EAB to five per cent or less of EAB's shares within three years of consummation of the transaction, provided that such period may be extended for good cause by the Board or by the Federal Reserve Bank of San Francisco under delegated authority.

With respect to the applications to acquire Crocker's nonbank subsidiaries, it was previously determined that the balance of public interest factors

prescribed by section 4(c)(8) of the BHCA favored approval of the acquisition of these companies when they were acquired originally by Crocker. Nothing in the record suggests that Midland's acquisition of Crocker would alter that balance. Furthermore, the Board has determined that retention by Midland of Samuel Montagu (Metals), Inc., Thomas Cook, Inc. (issuance and sale of travelers checks, London American Finance Corporation, LAFCO (Western Hemisphere), Ltd., and Export Credit Corporation would produce benefits to the public and would be in the public interest. There is no evidence in the record that consummation of the proposal would, with respect to these section 4(c)(8) applications, result in undue concentration of resources, decreased or unfair competition, conflicts of interests,

unsound banking practices, or other adverse effects on the public interest. Accordingly, the Board has determined that the balance of public interest factors it must consider under section 4(c)(8) of the BHCA favors approval of the applications filed under that section, and that those applications should be approved.6/ (see p. 59a)

Similarly, with respect to Crocker's three Edge corporations, the public interest in the uninterrupted continuation of their service to customers favors approval of their retention after Crocker is acquired by Midland. The financial and managerial resources of Midland are regarded as consistent with approval of the affiliation of these three corporations with Midland, an organization broadly

represented in foreign markets, and their acquisition by Midland would enable these Edge corporations to continue the international services Crocker's Edge Corporations are able to provide to their customers, consistent with the purposes of the Edge Act to afford at all times a means of financing international trade, to stimulate competition for international banking and financing services, and to facilitate and stimulate United States exports. Accordingly, the Board finds that the applications filed under the Edge Act for the retention of Crocker Bank International (Chicago), Crocker Bank International (New York), and Crocker International Investment Corporation should be approved.

Midland has also applied, pursuant to section 4(c)(9) of the BHCA and

section 211.23 of the Board's Regulation K, to retain its wholly-owned subsidiary, Thomas Cook Group Ltd. ("TCG"), a worldwide travel agency whose U.S. subsidiary is Thomas Cook, Inc. ("TCI"). Midland, through its indirect subsidiary, TCI, engages in providing travel services in the U.S. as part of the worldwide travel services provided by its parent company, TCG. Section 211.23(f)(5)(iii)(B) of the Board's Regulation K specifically states that a foreign banking organization may engage in the activity of arrangement of passenger transportation (Standard Industrial Code 4722) in the United States only with the approval of the Board pursuant to section 4(c)(9) of the BHCA.

TCG, a British company controlled by

Midland since 1972 and wholly owned by Midland since 1977, provides retail and wholesale travel arrangements and sells travelers checks on a worldwide basis through its subsidiaries. TCG currently engages in the wholesale and retail travel business through the Travel Division of its wholly-owned U.S. subsidiary, TCI, a New York Corporation. TCI serves customers in both the business (70 per cent of its revenues) and pleasure (30 per cent of its revenues) travel segments through a nationwide retail network of 66 travel outlets in 53 cities in the U.S. Several of the outlets in New York engage in both wholesale (i.e., packaging of tours) and retail travel business. All other U.S. outlets engage only in retail business.

In support of its application to

retain TCI, Midland has made a number of commitments and presented evidence to demonstrate that an exemption under section 4(c)(9) would not be at variance with the purposes of the BHCA and would be in the public interest. In the past, Midland and TCI have not sought public recognition of their connection and there is little public identification in the U.S. of one with the other. Midland has committed to preserve the complete separation of its banking operations in the U.S., whether conducted through Crocker or otherwise, from the travel business conducted in the U.S. by TCI. Midland also contends that retention of TCI would be in the public interest because TCI brings foreign revenues to the U.S. by virtue of its relationship with TCG.

Section 4(c)(9) of the BHCA provides that the nonbanking prohibitions of section 4 shall not apply to the investments or activities of a foreign company that conducts the greater part of its business outside the U.S. if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of the BHCA and would be in the public interest. In determining whether to grant an exemption under section 4(c)(9), the Board has generally considered among other things whether such exemption would give the foreign institution a competitive advantage over domestic banking organizations.7/ (see p. 58a)

With respect to this application, the Board notes that not only are the travel agency activities of TCI impermissible for domestic banking organizations but TCI, in addition to providing travel services to its customers, provides nationwide outlets for the sale of Thomas Cook travelers checks and the conducting of foreign currency transactions. Thus, Midland would be able, through TCI, to combine under common ownership and operation permissible section 4(c)(8) activities with the impermissible activity of operating a travel agency. No U.S. banking organization is able to market section 4(c)(8) services throughout the U.S. in the same manner.8/ Midland's commitments regarding the separation of its U.S. travel and banking business do not reduce the competitive advantage

Midland would gain over domestic organizations in the conduct of its permissible nonbanking activities. Thus, based on all the facts of record, the Board concludes that Midland's retention of the travel services of TCI would be substantially at variance with the purposes of the BHCA and that the application to retain TCI under section 4(c)(9) should be and is denied. Accordingly under section 4(a)(2) of the BHCA, Midland must divest the travel agency operations of TCI within two years of acquiring Crocker, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of San Francisco pursuant to delegated authority.9/ (see p. 59a)

Midland has also indicated that it intends to retain certain indirect

investments in the United States through foreign nonbanking companies on the basis of section 2(h) of the BHCA (12 U.S.C. 1841(h)). In each instance, Midland has provided information on the size and amount of assets and revenues of the foreign company abroad and of its U.S. operations, and information on whether the activity of the U.S. operations is in the same general line of business as that of the foreign nonbanking company. From the information provided, it appears that retention of these investments is permissible under section 2(h).

Based on the foregoing and other considerations reflected in the record, the Board has determined that the applications under sections 3(a)(1) and 4(c)(8) of the BHCA and under the Edge Act should be and hereby approved subject

to the following conditions:

(1) that Midland reduce its interest in EAB to five per cent or less of EAB's shares within three years of consummation of the transaction; and

(2) that Midland divest the travel agency operations of TCI or reduce its interest in TCI to five per cent or less of TCI's shares within 2 years of consummation of the transaction.

The periods referred to above may be extended for good cause by the Board or by the Federal Reserve Bank of San Francisco under delegated authority. The acquisition of Crocker shall not be made before the thirtieth calendar day

following the effective date of this Order, or later than three months after the effective date of this Order unless such period is extended for good cause by the Board or by the Federal Reserve Bank of San Francisco pursuant to delegated authority. The determination as to Midland's acquisition of Crocker's nonbank subsidiaries and retention of its own nonbank subsidiaries under section 4(c)(8) of the Act is subject to the conditions set forth in section 225.4(c) of Regulation Y, and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's Orders and regulations issued thereunder, or to prevent evasion thereof.

By Order of the Board of Governors,10/ effective August 25, 1981.

(Signed) William W. Wiles

Williams W. Wiles

Secretary of the Board

1/ As noted above, Midland applied pursuant to section 4(c) to retain TCG's U.S. travelers check business.

2/ Banking data for Midland are as of December 31, 1980.

3/ Banking data for Crocker and market data are as of December 31, 1980

4/ Midland does have, as discussed below, a 20.125 per cent interest in European American Bancorp, New York, New York, which as a wholly-owned subsidiary bank, European American Bank Trust Company, New York, New York. In addition, Thomas Cook Travellers Cheques, Ltd. is licensed as a banking agency under New York State Banking Law.

5/ The other shareholders of EAB are Societe Cenerale de Banque, S.A., Brussels, Belgium (20.125%); Deutsche Bank A.G., Frankfurt, Germany (20.125%); Amsterdam-Rotterdam Bank, N.V., Amsterdam, The Netherlands (17.0%); Societe Generale, Paris, France (20.125%); and Creditanstalt Bankverein, Vienna, Austria (2.5%).

6/ In light of the Board's action requiring Midland's divestiture of EAB, the applications filed under section 4(c)(8) to retain EAB's nonbank subsidiaries are rendered moot.

7/ See The Royal Trust Company, 60 Federal Reserve Bulletin 58 (1974); Lloyds Bank Limited, 60 Federal Reserve Bulletin 139 (1974); The Bank of Tokyo, Ltd., 61 Federal Reserve Bulletin 449 (1975); and Israel Discount Bank Limited,

66 Federal Reserve Bulletin 910 (1980).

8/ By Order dated January 26, 1976, the Board found that the operation of a travel agency is not closely related to banking and therefore determined not to add the operation of a travel agency to the list of permissable activities in Regulation Y (62 Federal Reserve Bulletin 148 (1976)).

9/ As noted above, a subsidiary of Midland is licensed by the New York State Banking Department to maintain an agency in New York City and has operated the agency since prior to July 26, 1978. Although Midland has not asserted grandfather rights under the Internatinal Banking Act of 19878 to retain TCI, the Board has examined the question of Midland's grandfathered status. In light of previous Board determinations that an otherwise grandfathered foreign bank loses that status upon the acquisition of a U.S. subsidiary Bank, the Board has determined that Midland may not retain the travel agency operation of TCI pursuant to 12 U.S.C. 3106(c). National Westminster Bank Limited, 65 Federal Reserve Bulletin 357 (1979); Algemene Bank Nederland, N.V., 65 Federal Reserve Bulletin 658 (1979).

10/ Voting for these actions: Chairman Volcker and Governors Schultz, Wallich, Partee and Gramley. Absent and not voting: Governors Teeters and Rice. Not voting on the insurance activities: Governors Schultz and Wallich.

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

June 22, 1981

Mr. William Leighton
President
Option Advisory Service, Inc.
P.O. Box 34
Village Station
New York, New York 10014

Dear Mr. Leighton:

This is in response to your letter of June 9, 1981, regarding the application of Midland Bank Limited, London, England, to become a bank holding company by acquiring Crocker National Corporation, San Francisco, California.

You describe your earlier letter of June 7 as a motion pursuant to section 10 of the Board's Rules of Practice for Hearings, 12 C.F.R. 263.10, and thereby request a change of venue for the public meeting, ordered by the Board on May 26, 1981, to be held in San Francisco, California. Since the meeting ordered by the Board is not a formal hearing, the Board's Rules of Practice for Hearings do not apply to this proceeding. In any event, as stated in the May 26, Order the Board ordered the meeting to be held in San Francisco because of "the importance of Crocker National Bank in the Communities in which it operates and the interest of the public in the proposal."

Accordingly, your request for a change of venue of the public meeting is denied.

Your June 9 letter will be included as part of the record that will be submitted to the Board on the application.

Very truly yours,

James McAfee
Assistant Secretary of the Board

cc: FRB of San Francisco
Mr Bransilver

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

May 26, 1981

Mr. William Leighton
President
Option Advisory Service, Inc.
P.O. Box 34
Village Station
New York, New York 10014

Dear Mr. Leighton:

This is in reference to your letter to the Board of May 13, 1981, expressing opposition to the application of Midland Bank Limited, London, England, for Board approval pursuant to section 3(a)(1) of the Bank Holding Company Act to become a bank holding company by acquiring Crocker National Corporation, San Francisco, California. Your letter refers to a letter to the Board of April 8, 1981, protesting the application and requesting a hearing. A thorough search of Board records has revealed that no such letter has been received.

Under the Board's Rules of Procedure, the Board may, in its discretion, take into consideration the substance of commments with respect to an application that are not received within the appropriate time period. However, the Board does not consider untimely requests for hearings (12 C.F.R. 262.3(e)).

As the enclosed notice indicates, however, the Board has determined to hold a public meeting on this application at which interested persons may present their views on this application. If you desire to participate in this proceeding, or to submit materials that would be made part of the record of this proceeding, you should notify the Assistant Secretary of the Board by June 12, 1981.

If you have any questions in this regard, please feel free to contact Mr. C. Keefe Hurley, Assistant General Counsel (202/452-3269) or Mr. James S. Keller, Senior Attorney (202/452-3582), of the Board's Legal Division.

Very truly yours,

James McAfee
Assistant Secretary of the Board

Enclosure

cc: Federal Reserve Bank of San Francisco
Mr. Ed Bransilver

Federal Register / Vol. 46, No. 104 / Monday, June 1, 1981 / Notices. Page 29333

FEDERAL RESERVE SYSTEM

Midland Bank Limited; Public Meeting

Midland Bank Limited, London, England, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 50 percent or more of the voting shares of Crocker National Corporation, San Francisco, California. Notice of this application was published in the Federal Register on March 23, 1981(46 FR 18,066).

The Board has received from the public three protests to this application, one of which requested the Board to hold a formal hearing on the application. The Board has determined that the three protests are not substantive and that the hearing request should be denied. However, while there is no legal requirement to hold any public proceeding on this application, in light of the importance of Crocker National Bank in the communities in which it operates and the interest of the public in the proposal, the Board has determined to hold a public meeting on the application in San Francisco, California. The meeting will commence at 9:00 a.m. on June 22, 1981, at the Federal Reserve Bank of San Francisco, 400 Sansome Street, San Francisco, California 94120.

Any person who desires to give testimony, present evidence, or otherwise participate in this proceeding should file with the Assistant Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, on or before June 12, 1981, a written request containing a statement of the nature of that person's interest in the proceedings, the extent of the participation desired, a summary of the matters concerning which that person desires to give testimony, submit evidence or raise questions, and the names and identity of witnesses who propose to appear. Such requests will be submitted to the designated presiding officer of the proceeding.

By order of the Board of Governors, effective May 26, 1981.

James McAfee,
Assistant Secretary of the Board.

(FR Doc. 81-16346 filed 5-29-81; 8:45 am)
BILLING CODE 6210-01-M

European American Bancorp
Consolidated Statement of Condition Dec. 31, 1980

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Roger Alioo
Director & Member of the
Executive Committee
Societe Generale de Banque S.A.

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Vice President, Finance and
Chairman of the Board
Chief Financial Officer
Rockwell International Corporation

Andre J. Ditto
Vice Chairman

Henry E. Ekblom
Chairman & Chief Executive Officer

Joseph G. Gavin, Jr.
President, Grumman Corporation

Wilfried Guth
Managing Director
Deustsche Bank A G

Charles S. Hamilton, Jr.

Lyman C. Hamilton, Jr.
Chairman & President
Tamco Enterprises, Inc.

Jack Hendley
Senior General Manager
International Division
Midland Bank Limited

lfred Herrhausen
Managing Director
Deutsche Bank A G

F. Hoogendljk
Managing Director
Amsterdam-Rotterdam Bank N.V.

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Paul-Emmanuel Janssen
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Marc Vienot
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Onno Vogelennang
Chairman, Management Board
Amsterdam-Rotterdam Bank N.V.

Konrad M. Weis
President & Chief Executive Officer
Mobay Chemical Corporation

Malcoim G. Wilcox
Director & Chief General Manager
Midland Bank Limited

Jean Cattier
Honorary Chairman

ASSETS ****
$7,771,221,000

LIABILITIES ****
$7,771,221,000

EAB
European American Bank
10 Hanover Square, New York, N.Y.
10015*212/437-4300

M 267

1968

FILED
Sep 18, 1969
NEW YORK COUNTY
CLERK'S OFFICE

CERTIFICATE OF CONTINUED USE OF PARTNERSHIP NAME

of

SHEARMAN & STERLING

Pursuant to Section 81
of the Partnership Law

Dated, August 15, 1969

SHEARMAN & STERLING
20 EXCHANGE PLACE
NEW YORK 5

We, the undersigned, DO HEREBY CERTIFY that we are transacting the business of a law partnership at 20 Exchange Place, City, County and State of New York, under the name of SHEARMAN & STERLING, as successors in interest to the persons heretofore using that name, and that the names of the persons conducting or transacting such business, with the residence addresses of such persons, respectively, are as follows:

Hans H. Angermueller, 1 Surrey Road, Summit, N.J.
John R. A. Beatty, 25 East 86th Street, New York, N.Y.
Clifford M. Bowden, High Farms Road, Glen Head, L.I., N.Y.
Edward Bransilver, 340 Riverside Drive, New York, N.Y.
John C. Bullitt, R. D. 1, Princeton, N.J.
William D. Carroll, 1008 Fifth Avenue, New York, N.Y.
Robert Carswell, 167 East 63rd Street, New York, N.Y.
Robert L. Clare, Jr., 605 Linden Place, Cranford, N.J.
Henry W. Connelly, 75 Oakdview Terrace, Short Hills, N.J.

Otto Crouse, 20 East 76th Street, New York, N.Y.
Harold J. Daw, 10 Kempster Road, Scarsdale, N.Y.
Thomas A. Dieterich, 149 Prospect Street, Leonia, N.J.
Joseph A. Doyle, 32 Washington Square West, New York, N.Y.
Joseph W. Drake, 12 Hook Road, Rye, N.Y.
Fredrick M. Eaton, 791 Park Avenue, New York, N.Y.
Robert M. Feely, 1220 Park Avenue, New York, N.Y.
Thomas F. Fennell, II, 54 Riverside Drive, New York, N.Y.
Arthur Norman Field, 420 East 23rd Street, New York, N.Y.
Thomas P. Ford, 131 East 66th Street, New York, N.Y.
Michael V. Forrestal, 25 Central Park West, New York, N.Y.
Samuel Frankenheim, 128 Willow Street, Brooklyn, N.Y.
Chauncey B. Garver, Sandy Hill Road, Oyster Bay, L.I., N.Y.
D. Christian Gauss, 50 Oenoke Lane, New Canaan, Conn.
Charles Goodwin, Jr., 175 East Clinton Avenue, Tenafly, N.J.
Patrick J. Growney, 200 East 71st Street, New York, N.Y.
Henry B. Guthrie, 169 East 70th Street, New York, N.Y
Hamilton Hadden, Jr., L.I. Expressway, Jericho, N.Y.
Eric H. Hager, 623 Lake Avenue, Greenwich, Conn.
Henry Harfield, 558 East 87th Street, New York, N.Y.
Thomas L. Higginson, 55 Wheatley Road, Glen Head, L.I., N.Y.
John E. Hoffman, Jr., 11 High Point

Circle, Chappaqua, N.Y.
Arne Hovdesven, Hardscrabble Road, Briarcliff Manor, N.Y.
Henry James, c/o Canadian Club of New York, Inc., Park Avenue at 50th Street, New York, N.Y.
C. Bedford Johnson, 180 East 79 Street, New York, N.Y.
Gilbert Kerlin, Dodge Lane and Palisade Avenue, Riverdale, N.Y.
Andrew Kirkpatrick, Milton Harbor House, Apt. 4C, 720 Milton Road, Rye, New York
Robert H. Knight, 548 Stanwich Road, Greenwich, Conn.
Robert H. MacKinnon, 510 East 86th Street, New York, N.Y.
R. Bruce MacWhorter, 85 Jefferson Ave., Maplewood, N.J.
David T. McGovern, 22 Villa Said, Paris, France
Grayson M-P. Murphy, 234 East 62nd Street, New York, N.Y.
Thomas R. Nangle, Perkins Road, Woodbridge, New Haven, Conn.
Peter P. Nitze, 1 West 72nd Street, New York, N.Y.
Thomas A. O'Boyle, 815 Knollwood Terrace, Westfield, N.J.
Charles C. Parlin, 123 Hillside Avenue, Englewood, N.J.
Charles C. Parlin, Jr., 132 Lydecker Street, Englewood, N.J.
Walter F. Pease, 1010 Mayfair Way, Plainfield, N.J.
George B. Pidot, Piping Rock Road, Locust Valley, L.I., N.Y.
William Rockefeller, 84 Grandview Avenue, Rye, N.Y.
James R. Rowen, 525 East 86th Street, New

York, N.Y.
Stanley I. Rubenfeld, 746 Kensington Court, Westbury, N.Y.
Douglas B. Steimle, 755 Park Avenue, New York, N.Y.
Arbie R. Thalacker, 92 Park Avenue, Bronxville, N.Y.
Edward Hallam Tuck, 129 East 94th Street, New York, N.Y.
Stephen R. Volk, 5 Briarwood Lane, Pleasantville, N.Y.
John W. Weiser, 10 Bellows Lane, Manhasset, N.Y.
Paul R. Weltchek, 535 East 86th Street, New York, N.Y.
Robert Nias West, 870 U.N. Plaza, New York, N.Y.
John A. Wilson, 10 Mountain Road, Tenafly, N.J.
Alan H. Wright, Oyster Bay Road, Syosset, L.I., N.Y.
Henry S. Ziegler, 151 East 79th Street, New York, N.Y.

IN WITNESS WHEREOF, we have executed this intrument as of August 15, 1969.

(Signatures follow) * * * *

* * *

STATE OF NEW YORK,
COUNTY OF NEW YORK.

On the 5th day of June, 1969, before me personally came ROBERT H. KNIGHT, to me known and known to me to be the individual described in an who executed the foregoing instrument, and severally acknowledged to me that he executed the same.

Gilbert M. Bleich

STATE OF NEW YORK,
COUNTY OF NEW YORK.

On the 9th day of June, 1969, befoe me personally came EDWARD BRANSIVLER, ARTHUR N. FIELD, HENRY HARFIELD, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

Gilbert M. Bleich

* * *

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY
Civil Action No. 6343

Florence Seigenfeld,

Plaintiff

v.

Thomas R. Wilcox, Milo W. Bekins, Jr. Donald L. Bower, Alexander Damm, J. Hallam Dawson, John J. Elmore, Roberta Fenlon, M.D., Carl C. Gregory, Peter E. Haas, Stanley Hiller, Jr., Jerome W. Hull, Robert Gibson Johnson, Jerome W. Komes, Richard G. Landis, John G. Lowe, William L. Morris, John B.M. Place, James R. Shepley, Robert B. Shetterly, William French Smith, S. Donley Ritchey, Crocker National Corporation, a Delaware corporation and Midland Bank, Limited, an English banking corporation

Defendants

STIPULATION AND AGREEMENT OF SETTLEMENT

The named parties to the above-captioned civil action ("the Action"), by and through their respective attorneys, propose the following Stipulation and Agreement of Settlement of the Action ("the Stipulation" or "the Settlement") for the Court's approval:

WHEREAS * * * * *

D. On December 22, 1980, prior to the special meeting, Florence Seigenfeld, a Crocker stockholder, brought this Action denominated as a class action on behalf of all persons other than the defendants named in the Action who own Crocker common stock. The plaintiff named Midland, Crocker and all of the directors of Crocker ("the Individual Defendants") as defendants. The complaint alledged that the price Midland proposed to pay to Crocker's stockholder pursuant to the tender offer contemplated by the Investment Agreement was inadequate and unfair. The complaint also alleged that the Investment Agreement and related amendments to certain of Crocker's stock option plans would result in improper benefits to three of Crocker's directors (Thomas R. Wilcox, John B. M. Place and William L. Morris), and, further, that if the defendants consummated the proposed tender offer on the terms set forth in the Investment Agreement, defendants would breach a fiduciary duty owed to plaintiff's alleged class. The complaint further alleged that the individual defendants breached a fiduciary duty owed to the alleged class by not stating in the proxy materials for the December 22, 1980 special meeting of stockholders the intentions of each of the Individual Defendants as to whether or not he would tender any Crocker shares he owns or controls as an individual in response to the proposed tender offer by Midland. The Complaint seeks an injunction against implementation of the Investment Agreement, an accounting by defendants to the plaintiff's class for damages sustained by the class and profits obtained by the defendants from the

actions about which plaintiff complains, and an award to plaintiff of costs and expenses, including asttorneys' fees. On March 26, 1981, plaintiff amended her complaint to add a prayer for an Order setting aside the vote of the Crocker stockholders approving the Investment Agreement based on the nondisclosure alleged and moved for partial summary judgment on that claim.

x x x x x

F. By its agreement to the Settlement, Midland hereby enters its appearance in the Action but only on the condition that it may withdraw its appearance without prejudice if the Settlement does not become the basis for a final and binding judgment dismissing the Action, as contemplated by the Settlement and as defined in Paragraph 10. If for any reason the Settlement is not consummated, Midland intends to withdraw its appearance and the Court will be requested to decide the now-pending motions to dismiss the Action and for partial summary judgment.

G. The named defendants in the Action deny any and all wrongdoing or liability to plaintiff or the classes as defined in Paragraph 1 hereof with reference to the matters referred to in the Second Amended Complaint provided for by the Stipulation. Nevertheless, defendants consider it desirable that the Action be settled and dismissed on the terms provided for herein because such settlement and dismissal (1) will avoid the substantial expense, inconvenience and distraction of continued protracted litigation, and (2) will finally put to

rest the claims referred to in the Action.

* * * *

I. On April 9, 1981, the plaintiff in this Action brought a separate action in the United States District Court for the District of Delaware, entitled Seigenfeld v. Crocker National Corporation, et al., Civil Action No. 81-144 ("the District Court Action"), challenging the validity of the election of directors of Crocker at the annual meeting of its shareholders held on April 21, 1981. The plaintiff brought the District Court Action derivatively on behalf of Crocker and, further, on behalf of a class consisting of all owners of common stock of Crocker other than the named defendants, i.e., Crocker and all its directors. The plaintiff did not name Midland as a defendant in the District Court Action. The complaint in the District Court Action alledged that Crocker and its directors violated the federal securities laws by distributing proxy materials to Crocker stockholders in connection with the annual meeting of Crocker stockholders for the election of directors held on April 21, 1981, which omitted to state material facts, namely, the existence of the Action and a description of the allegations of wrongdoing contained in the Action, which facts the plaintiff claimed were necessary in order to make the statements in the proxy materials distributed to Crocker stockholders not false or misleading. The election of directors at the annual meeting of Crocker stockholders held on April 21, 1981, was uncontested and all of the incumbent

directors of Crocker were reelected at that meeting. The complaint in the District Court Action seeks an Order (1) voiding the results of the election and directing Crocker to resolicit proxies for a new election; (2) an award of damages; and (3) the plaintiff's costs and attorneys' fees. On April 30, 1981, the plaintiff moved for summary judgment on her complaint in the District Court Action and filed a brief in support thereof. x x x x x

IT IS HEREBY STIPULATED AND AGREED, by and among the named parties by their attorneys, subject to the approval of the Court and pursuant to Rule 23 and 23.1 of the Coourt, that all claims that are or could have been asserted by the plaintiff's in the Action, including all claims asserted in the plaintiff's Second Amended Complaint, either individualy or on behalf of any member of the classes as defined in Paragraph 1 hereof, against any of the named defendants including Midland, or which have been or could have been asserted against any present or former officer, director, agent, attorney or representative of Crocker or Midland in connection with or that arise now or hereafter out of the Act, or any matters, transactions or occurrences which are the subject of the Action, including the matters referred to in the Second Amended Complaint ("the Settled Claim") shall be compromised and settled and dismissed with prejudice upon and subject to the following terms and conditions:

* * * *

17. By the signature of its attorneys executing the Stipulation on its behalf, Midland appears in the Action

for the purposes of the Settlement only, on the condition that is appearance may be withdrawn without prejudice if the Settlement does not become the basis for a final and binding judgment dismissing the Action, as contemplated in the Settlement. If for any reason the Settlement is not consummated, Midland may withdraw its appearance.

18. The Stipulation may be executed in two or more counterparts.

MORRIS and ROSENTHAL P.A.
by /s/ Irving Morris, Kevin Gross and XXX,
One Customs House Square
P.O. Box 1070, Wilmington, Delaware 19899, Attorneys for Plaintiff Florence Seigenfeld

MORRIS, NICHOLS, ARSHT & TUNNEL
by /s/ Richard L. xxx
1105 North Market Street
Wilmington, Delaware 19899
Attorneys for Defendants Thomas R. Wilcox, Milo W. Bekins, Jr., Donald L. Bower, Alexander Damm, J. Hallam Dawson, John J. Elmore, Roberta Fenlon, M.D., Carl C. Gregory, Peter E. Haas, Stanley Hiller, Jr., Jerome W. Hull, Robert Gibson Johnson, Jerome W. Komes, Richard G. Landis, John G. Lowe, William L. Morris, Joh B. M. Place, S. Donley Ritchey, James B. Shepley, Robert B. Shetterly, William French Smith and Crocker National Corporation

POTTER, ANDERSON & COROON
by /s/ Michael D. Goldman
350 Delaware Trust Building
P.O. Box 951
Wilmington, Delaware 19899

Attorneys for Midland Bank Limited

Dated : August 20, 1981 8:57 P.M.

CHANCERY COURT
Of The
STATE OF DELAWARE

December 28, 1981

WILLIAM MARVEL, Chancellor

Court House
Wilmington, Delaware

Irving Morris, Esquire
P.O. Box 1070
Wilmington, DE 19899

Richard L. Sutton, Esquire
P.O. Box 1347
Wilmington, DE 19899

Charles S. Crompton, Jr., Esquire
P.O. Box 951
Wilmington, DE 19899

Re: Seigenfeld v. Wilcox, C.A. 6343
Submitted: October 20, 1981

On October 9, 1980, the defendants Midland Bank Limited and Crocker National Corporation reached an agreement under the terms of which Midland undertook to acquire a controlling interest in Crocker by means of an offer for tenders of

6,500,000 shares of Crocker stock. Such agreement provided that the price to be offered to Crocker's shareholders for tenders of their common stock to Midland was to be not less than the lower of either book value or $50.00 per share. Such agreement was to be consummated as of the end of Crocker's fiscal quarter preceding receipt by Midland of all required governmental approvals of the contemplated transaction, it having geen apparently anticipated at the time by both Midland and Crocker that during 1981 the book value of Crocker stock would probably increase so as to exceed $50.00 per share. Midland also agreed to purchase an additional 5,500,000 shares of Crocker stock over a period of four years following completion of the aforesaid offer for tenders of stock.

Plaintiff's complaint attacked the first part of such agreement on the ground that the proposed offer for tenders, being for less than the alleged fair value of Crocker's common stock, was patently unfair to Crocker's stockholders. The amended complaint also contended that the directors of Crocker had breached their fiduciary duty to their stockholders in going along with such agreement and submitting it to their stockholders with a recommendation that it be approved.

Ultimately, the opposing parties reached an agreement on a settlement of this litigation, which agreement hinges on the basic commitment that Midland would make its offer to Crocker's shareholders for tenders of their stock at a price of not less than $50.00 per

share, thereby surrendering its right to offer less than $50.00 for tenders of Crocker shares, namely its then book value. A stipulation and agreement of settlement was thereafter entered into on August 20, 1981. As of June 30 1981 the book value of Crocker shares was $49.33 per share.

According to the provisions of the investment agreement in issue, the execution of which led to the institution of this litigation, Midland was empowered to make a partial offer for tenders for up to 6,500,000 shares of Crocker common stock for the avowed purpose of acquiring a fifty-seven percent interest in such corporation.

Plaintiff now contends that as a result of the settlement negotiated by her attorneys a benefit has been obtained

for the class which she represents in the amount of $.67 for each share of Crocker common stock offered and accepted by Midland under provisions of the offer for tenders, said sum being the difference between $50 per share and the book value per share of each said share of stock, namely $49.33. According to plaintiff, if the tender offer is fully subscribed, the total amount of the benefit which will allegedly be conferred on Crocker's shareholders will be approximately $4,355,000 or 6,500,000 times $.67 per share, the latter figure being the difference between book value of $49.33 and $50. Plaintiff has accordingly applied to the Court for an award to her attorneys of 20% of the benefit allegedly conferred on Crocker's shareholders as a result of the efforts of her attorneys. If the tender offer is fully subscribed,

the resulting fee would allegedly be a maximum of $871,000 or 20% of $4,355,000. 1/ (See p. 97a)

Defendants Midland and Crocker have agreed to "### pay any sum the Court allows upon the plaintiff's application for the allowance of attorney's fee.....," See notice to stockholers informing them of the proposed settlement. Defendants, however, argue that assuming any fee has been earned by counsel for plaintiff, the award of a fee of 20% of the alleged benefit resulting from settlement of this litigation is excessive, contending that if the total fee sought were to be granted, it would amount to between $737,000 and $871,000, and the computed hourly rate for services rendered would range from $1,228.00 to $1,451.00 per hour inasmuch as

plaintiff's attorneys have devoted a total of less than 600 hours to the prosecution and settlement of this litigation.

The reasons for defendant's opposition to an award of a fee in the amount sought based on the alleged benefits flowing from this litigation is (1) that a fee application must be founded upon a complaint which is not susceptible to dismissal for failure to state a claim which the complaint in issue allegedly fails to do, and (2) that any fee allowance as such must result in a reasonable hourly rate for the attorneys to be compensated, and (3) that the benefits allegedly gained as a result of the efforts of plaintiff's counsel were not the result of the skills of plaintiff's attorney, there being no

connection between efforts of plaintiff's counsel and the results obtained, See Dann v. Chrysler Corporation, Del. ch., 215 A.2d 709 (1965), aff'd Chrysler Corp. v. Dann, Del. Supr., 233 A.2d 384 (1966).

Plaintiff, on the other hand, argues that the allowance of a fee on the basis of the benefits achieved, allegedly as a result of her attorney's efforts, is supported by the Delaware precedents on the subject and is fully justified by the factors to be considered on fee applications, and stresses the fact that the allowance of a fee for her attorneys was contingent on a successful result which has been achieved. Pointing to the results allegedly achieved by the efforts of her counsel, plaintiff citing Professor Hornstein, contends that:

> The nature and circumstances

> of each individual case should determine a fair and reasonable fee. The problem becomes more difficult where a fee is not negotiated between the interested parties, but must be fixed by a court after the event. Yet the issue is still economic--the price for a service. An attorney's services comprise learning, acumen, and technical skill, the value of which cannot be measured like a ton of coal. Add further public policy considerations which require "a flavor of generosity," and one begins to appreciate the court's dilemma." Hornstein, Legal Therapeutics: The "salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 681 (1956).

I find the present action to have been meritorious under the test set forth in the Chrysler opinions, it not being necessary that factually there be an absolute assurance of ultimate success, but only that there be some reasonable hope of success. In the case at bar, the Court has approved a settlement which guarantees a price per share of $50, a

figure which was previously only a hope. If the defendants were genuinely of the belief that plaintiff's complaint was without merit, they should have moved to dismiss it on such ground. The fact is that there was originally a commitment on the part of Midland to pay not less than book value or $50.00. Petitioner then filed her complaint, and a settlement was reached under the terms of which the $50.00 per share offering price was made firm, and while defendants might have ultimately agreed to the payment of the higher amount of $50 on their own initiative, and while they also could have filed a motion to dismiss the complaint, or gone to trial, they chose to settle.

Turning to defendants' stronger argument,namely that requested fee is

exorbitant on an hourly rate, plaintiff, citing Sugarland Industries, Inc. v. Thomas, Del. Supr., 420 A.2d 142 (1980), contends that her attorneys should be awarded 20% of the benefit bestowed on the class while defendants contend that althought the attorneys in the cited case were ultimatley awarded 20% for their efforts in Phase I of the litigation, that the Supreme Court of Delaware tested the computations bearing on the reasonableness of the requested fee on an hourly rate basis and decided that compensation at the rate of $433.00 per hour for 2800 hours of work was "in our judgment, generous by almost any standard." Consequently, defendants contend that the cited case places a top of $433.00 per hour or thereabouts on a fee application, such as the one at bar.

In declining to follow the ruling of the Third Circuit Court of Appeals made in the cases of Lindy Bros. Blders., Inc. of Phila. v. American R & S San Corp., C.A.3, 487 f.2d 161 (1973), and 540 F.2d. 102 (1976) the Supreme Court of Delaware stated:

> "it has, indeed, been said that the time approach is virtually the sole consideration in making a fee ruling under Lindy I. Be that as it may, we conclude that our Chacery Judges should not be obliged to make the find of elaborate analysis called for by the several opinions in Lindy I and Lindy II. To put it another way, while Lindy's careful craftmanship has much to commend it, we are not persuaded that our case law governing fee applications is an inadequate criterion for a fair judgment in this case, nor that new guidelines are needed for the Court of Chancery."

A pertinent consideration applicable to the case at hand is the amount of the

benefit gained.

> Also, as might be expected, the amount of the benefit affects the percentage employed; if the benefit is very large, a lower percentage or even percentages graduated downward are used. In single litigation different percentages have been used for separable parts of the revoery, reflecting different types of legal skill or degrees of success."

Hornstein, supra at 664.

Applying the above criteria in a positive light, I note that plaintiff attorneys have accepted this case on a contingency basis with no guarantee of success or of payment for their efforts. Their reputation as competent counsel is well known throughout this legal community and might even have helped account for the fact that settlement was reached so quickly. However, a negative application of the cited standards must

take into consideration that less than 600 hours have been devoted to this litigation by these same attorneys and the complexities of the case were never tested in Court except at the settlement hearing.

I conclude that the size of the fee sought, which is enormous, when tested on an hourly basis, is attributable to the fact that the potential maximum number of shares of Crocker stock involved in the offer for tenders made by Midland was 6,500,000 and that the same amount of work on the part of plaintiff's attorneys would undoubtedly have been applied to the successful settlement of this litigation had the number of shares involved been only a few thousand or less. In short, this is not a case such as the one posited by Professor

Hornstein, namely that of one thousand plodding hours being less productive than one imaginative brilliant hour but rather a settlement achieved on a logical and mathematical but not a brilliant basis, the size of which has been vastly magnified by reason the number of the shares involved.

Taking this factor into consideration and applying it together with the principle that if the benefit achieved by litigation such as the one at bar is very large, a lower percentage is to be allowed as a fee based on approximately 6% of the total monetary benefit achieved in settlement on behalf of the stockholders of Crocker National Corporation, namely the sum of $250,000, is reasonable and fair when tested on an hourly basis, Sugarland Industries, Inc.

v. Thomas, supra, and Thomas v. Surgarland Industries, Inc., supra.

Accordingly, a fee in such amount will be awarded to plaintiff's attorneys for their efforts in achieving the settlement which has been reached in this litigation, an amount which Crocker National Corporation has agreed to pay without any assistance from Midland, thus permitting the stockholders of Crocker National Corporation to receive the full benefit of the settlement which has been approved.

On notice, an order in conformity with the above may be submitted.

1/ At oral argument it was stated that as of October 20, 1981 6,511,084 shares has been tendered. See plaintiff's Exhibit 54. However, 24,418 of these shares were tendered by individual defendants who are not member of the class. See plaintiffs exhibit 55.

INVESTMENT COMPANY ACT OF 1940
Release No. 12229 / February 16, 1982

In the Matter of	:
	:
MIDLAND BANK, LIMITED	:
c/o Peter Darrow, Esq.	:
Shearman & Sterling	:
53 Wall Street	:
New York, New York 10005	:
(812-4997)	:

ORDER PURSUANT TO SECTION 6 (c) OF THE ACT EXEMPTING APPLICANT FROM ALL PROVISIONS OF THE ACT

Midland Bank, Limited ("Applicant"), a United Kingdom commercial bank, filed an application on October 21, 1981, for an order of the Commission pursuant to Sectin 6 (c) of the Investment Company Act of 1940 ("Act") exempting Applicant from all provisions of the Act.

On December 11, 1981, a notice was issued (Investment Company Act Release No. 12101) of the filing of said application. The notice gave interested persons an opportunity to request a hearing and stated that an order pursuant to Section 6 (c) of the Act, disposing of the application, would be issued as of course unless a hearing should be ordered. No request for a hearing has been filed by an interested person and the Commission has not ordered a hearing. 1/ (see p. 101a)

The matter has been considered, and it is

found that the granting of the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Accordingly,

IT IS ORDERED, pursuant to Section 6(c) of the Act, that the application for exemption from all provisions of the Act be, and hereby is, granted, effective forthwith, subject to the condition that Applicant comply with it undertakings: (1) that the Applicant will ensure that the proposed commercial paper Notes will not be advertised or otherwise offered for sale to the general public; (2) that the Applicant will ensure that each offeree of the Notes will receive prior to purchase a memorandum describing Applicant's business and including Applicant's most recent publicly available annual financial statements. Such memorandum will describe the material differences between accounting principles applicable to United Kingdom banks and generally accepted accounting principles applicable to similar financial institutions in the United States. The memorandum will be at least as comprehensive as those customarily used in offering commercial paper in the United States and will be updated promptly to reflect material changes in Applicant's financial condition; and (3) that in any future offering of Applicant's securities in the United States, which will be limited to debt securities, each offeree will be provided a memorandum that is at least as comprehensive as those customarily used in offerings of such securities in the

United States.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

George A. Fitzsimmons
Secretary

1/ On January 5, 1982, Mr. William Leighton, president of Option Advisory Service, Inc. ("OAS"), an investment adviser registered under the Investment Advisers Act of 1940, requested on behalf of OAS, that a hearing be held on the application. Mr. Leighton's request does not state that either he or OAS has an ownership or other direct interest in the Applicant, and does not demonstrate that OAS is likely to be perceptibly harmed by the granting of the instant application. Nor does the request articulate any other basis for concluding that Mr. Leighton or OAS is an "interested person" within the meaning of Section 40 of the Act and Rule 0-5(c) under the Act. In addition, none of the issues raised by Mr. Leighton warrants the Commission ordering a hearing on its own motion.

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS INVOLVED

Constitution of the United States
Article III : Section 2
The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party. * * * In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * *

First Amendment: Congress shall make no law * * * abridging * * * the right of the people to petition the Government for a Redress of Grievances.

Administrative Procedure Act, 5 U.S.C. Section 554, Adjudications
(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *

(b) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in

the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

Bank Holding Company Act of 1956, as amended, 12 U.S.C. Section 1841
Section 3(a)(1), 12 U.S.C. 1842 Acquisition of bank shares or assets. Prior approval of Board as necessary exceptions disposition, time extensions; subsequent approval or disposition upon disapproval.

It shall be unlawful, except with the prior approval of the Board (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; * * *

3(b) Application for approval; notice to Comptroller of Currency or State authority; views and recommendations; disapproval; hearings; order of Board; nonaction deemed grant of application; procedure in emergencies or probable failures requiring immediate Board action and orders

* * * In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted. * * *

3(c) Factors governing determination of application for approval

* * * In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

3(d) Limitation by State boundaries

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later,

Section 9, 12 U.S.C. Section 1848;

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of columbia, by filing in the court,

within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28. Upon the filing of such petition the Court shall have the jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

Section 11(b) 12 U.S.C. Section 1849(b)

Antitrust proceedings; stay of approval by Board; review de novo; judicial standards; limitations; exemptions

The Board shall immediately notify the Attorney General of any approval by it pursuant to Section 1842 of this title of a proposed acquisition, merger, or consolidation transaction. * * * Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under Section 1842 of this title shall be commenced prior to the earliest time under this subsection at which the transaction approval under

Section 1842 of this title might be consummated. The commencement of such an action shall stay the effectiveness of the Board's approval, unless the court shall otherwise specifically order. * * *

CONFLICT OF INTEREST statute
18 U.S.C. Section 208 Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof

whoever, being an officer or employee of the executive branch of the United States Govenment, of any independent agency of the United States, a Federal Reserve bank director, * * * participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge accusation, arrest, or oter particular matter in which, to his knowldge, he, his spouse, minor child, partner, organization in which he is serving as a * * * partner * * * * has a financial interest- Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Depository Institutions Management Interlocks Act, 12 U.S.C. Section 3203

Dual service of management official of $1,000,000,000 institution or holding company as management official of unaffiliated $500;000,000 institution or holding company prohibited

> A depository institution or a depository holding company (that) has total assets exceeding $1,000,000,000, a management official of such institution or any affiliate thereof may not serve as a management official of any other unaffiliated depository institution or depository holding company having total assets exceeding $500,000,000 or as a management official of any affiliate of such other institution.

Equal Access to Justice Act, 5 U.S.C. 504
94 Stat. 2325

Findings and Purpose. Section 202(a) The Congress finds that certain individuals, partnerships, corporations, and labor or other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. * * *

Federal Reserve Act, Section 4, 12 U.S.C. Section 305

> Class C directors; selection; "Federal reser e agent"

Class C directors shall be appointed by the Board of Governors of the Federal Reserve System. They shall have been for at least two years residents of the district for which they are appointed, one of whom shall be designated by said board as chairman of the board of directors of the Federal reserve bank and as "Federal reserve agent". He shall be a person of tested banking experience and in addition to his duties as chairman of the board of directors of the Federal reserve bank, he shall be required to maintain, under regulations to be established by the Board of Governors of the Federal Reserve System, a local office of said board on the premises of the Federal reserve bank. He shall make regular reports to the Board of Governors of the Federal Reserve System and shall act as its official representative for the performance of the functions conferred upon it by this chapter. He shall receive an annual compensation to be fixed by the Board of Governors of the Federal Reserve System and paid monthly by the Federal reserve bank to which he is designated. One of the directors of class C shall be appointed by the Board of Governors of the Federal Reserve System as deputy chairman to exercise the powers of the chairman of the board when necessary. In case of the absence of the chairman and deputy chairman, the third class C director shall preside at meetings of the board.

Foreign Agents Registration act of 1938, as amended, 22 U.S.C. Section 611 et seq.

Section 611. Definitions

As used in and for the purpose of this subchapter-the term foreign principal includes

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means-

(1) any person who acts as an agent, reprentative, employee, or servant, or any person who acts in any other capacity at the order request or under the direction or control, of a foreign principal * * * and who directly or through any person-

* * * (iv) within the United States represents the interest of such foreign principal before any agency or official of the Government of the Unitd States; * *

Section 613 (g) Person qualified to practice law.

(g) Any person qualified to practice law, insofar as he engages or agrees to engage in te legal representation of a disclosed foreign principal before any court of law or ny agency of the Government of the United

States: Provided, That for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal.

Section 618. Enforcement and penalties (a) Violations; false statements and willful omissions

Any person who - (1) willfully violates any provision of this subchapter or any regulation thereunder * * * shall, upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both * * *

Investment Company Act of 1940, 15 U.S.C. 80a

Section 6(c)

The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any persons, security, or transaction, or any class or classes of persons, securities, or transaction, from any provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the

protection of investors and the purposes fairly intended by the policy and provisions of this title.

Section 7(d). No investment company, unless organized or otherwise created under the laws of the United States or of a State, and no depositor or trustee of or underwriter for such a company not so organized or created shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, any security of which such company is the issuer. Notwithstanding the provisions of this subsection and of section 8(a), the Commission is authorized, upon application by an investment company organized or otherwise created under the laws of a foreign country, to issue a conditional or unconditional order permitting such company to register under this title and to make a public offering of its securities by the use of the mails and means or instrumentalitites of interstate commerce, if the Commission finds that, by reason of special circumstances or arrangements, it is both legally and practically feasible effectively to enforce the provisions of this title against such company and that the issuance of such order is otherwise consistent with the public interest and the protection of investors.

Section 49. Penalties. Any person who willfully violates any provison of this title or of any rule, regulation or order hereunder, * * * shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; * * *

Judicial Review Act, 28 U.S.C. Section 2347

Petitions to review; proceedings * * * (b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall--
(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
(3) transfer the proceedings to a district court for the district in whic the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issued of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

18 U.S.C. Section 1341. Mail Fraud.

> Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, etc. * * * places in any post office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the Postal Service * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Misprision of Felonies Act,
18 U.S.C. Section 4

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible made known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

Record on Review Act,
28 U.S.C. Section 2112(b)

> The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and

proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the said rules of the court of appeals may require to be included therein, * * *

Federal Rules of Appellate Procedure
Rule 16. The record on Review or Enforcement
(a) Composition of the Record. the order sought to be reviewed or enforced, the findings or report on which it is based and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency. * * *

Rules of the United States Court of Appeals for the Second Circuit

Rule 40. Petitions for Rehearing:
If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case.

Federal Rules of Civil Procedure
Rule 52(a). Findings by the Court. Effect.

* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

Code of Federal regulations, Banks and

Banking, 12 C.F.R.

Part 221, Regulation U - Credit by Banks for the purpose of Purchasing or Carrying Margin Stock

Section 221.1 General rule

(a) Purpose credit secured by stock.

(1) Except as provided in subparagraph (2) of this paragraph (a) and in 221.3(q) no bank shall extend credit secured directly or indirectly by any stock for the purpose of purchasing or carrying any margin stock in an amount exceeding the maximum loan value of the collateral, as prescribed from time to time for stocks in 221.4 (the Supplement to Regulation U) and as determined by the bank in good faith for credit subject to 221.3(s) for any collateral other than stocks: * * *

Section 221.2 Exceptions to general rule * * * (1) any credit extended outside the States of the United States and the District of Columbia; * * *

Part 224, Regulation X, Rules governing Borrowers who obtain Securities Credit

Section 224.1 Scope of part. * * * This part (Regulation X) implements Section 7(f) of the Act and generally applies to borrowers who are :

(a) Persons who obtain credit from within the united states or

(b) Those persons who obtain credit from outside the United States who are

(1) U.S. persons,

(2) Foreign persons who are controlled by U.S. persons, or
(3) Foreign persons acting on behalf of or in conjunction with U.S. persons.

Part 262, Rules of Procedure
Section 262.3(f), Action on Applications
The Board takes such action as it deems appropriate in the public interest. Such documents as may be necessary to carry out any decision by the Board are prepared by the Board's staff. With respect to actions taken by a Federal Reserve Bank of behalf of the Board under delegated authority, statements and necessary documents are prepared by the staff of such Federal Reserve Bank.

Section 262.3(k) Reconsideration of certain Board actions. The Board may reconsider any action taken by it on an application upon receipt by the Secretary of the Board of a written request of reconsideration from any party to such application, on or before the 15th day after the effective date of the Board's action.
* * *

Part 263, Rule of Practice for Hearings

Section 263.1 Authority, purpose, and scope.
* * * (b) Purpose and scope. This support prescribes rules of practice and procedure governing adjudications as to which a formal hearing is required by law or is for

other reason ordered by the Board. These adjudications include * * *
(5) Adjudications under section 2, 3, or 4 of the bnak Holding Company Act 12 U.S.C. 1841, 1842, or 1843.

Part 265, Rules regarding Delegation of Authority

Section 265.3 Review of Action at delegated level.

Any action taken at a delegated level shall be subject to review by the Board only if such review is requested by a member of the Board either on the member's own initiative or on the baisis of a petition for review by any person claiming to be adversely affected by the action. Any such petition for review must be received by the Secretary of the Board not later than fifth day after the date of such action. * * *